Abbreviated reference :
I.C.J. Pleadings, Vienna Convention on Consular Relations
(Paraguay v. *United States of America)*

Référence abrégée :
C.I.J. Mémoires, Convention de Vienne sur les relations consulaires
(Paraguay c. Etats-Unis d'Amérique)

ISSN 0074-4433
ISBN 92-1-070843-1

Sales number
N° de vente : 770

CASE CONCERNING THE VIENNA CONVENTION ON CONSULAR RELATIONS
(PARAGUAY *v.* UNITED STATES OF AMERICA)

AFFAIRE RELATIVE À LA CONVENTION DE VIENNE SUR LES RELATIONS CONSULAIRES
(PARAGUAY *c.* ÉTATS-UNIS D'AMÉRIQUE)

INTERNATIONAL COURT OF JUSTICE

PLEADINGS, ORAL ARGUMENTS, DOCUMENTS

CASE CONCERNING THE VIENNA CONVENTION ON CONSULAR RELATIONS

(PARAGUAY *v.* UNITED STATES OF AMERICA)

COUR INTERNATIONALE DE JUSTICE

MÉMOIRES, PLAIDOIRIES ET DOCUMENTS

AFFAIRE RELATIVE À LA CONVENTION DE VIENNE SUR LES RELATIONS CONSULAIRES

(PARAGUAY c. ÉTATS-UNIS D'AMÉRIQUE)

IMPRIMÉ EN FRANCE
PRINTED IN FRANCE

The present volume contains the Application, Request for the Indication of Provisional Measures, Oral Arguments on the Request, Amended Application, Conditional Request for an Order Conclusively Establishing Facts, Memorial and a selection of the correspondence in the case concerning the *Vienna Convention on Consular Relations (Paraguay* v. *United States of America).* This case, which was entered on the Court's General List on 3 April 1998 under Number 99, was removed from the List by an Order of the Court of 10 November 1998, following discontinuance by the applicant Government (*Vienna Convention on Consular Relations (Paraguay* v. *United States of America), Order of 10 November 1998, I.C.J. Reports 1998*, p. 426).

*

Regarding the reproduction of case files, the Court has decided that henceforth, irrespective of the stage at which a case has terminated, publication should be confined to the written proceedings and oral arguments in the case, together with those documents, annexes and correspondence considered essential to illustrate its decision. The Court has also specifically requested that, whenever technically feasible, the volumes should consist of facsimile versions of the documents submitted to it, in the form in which they were produced by the parties.

Accordingly, the Memorial reproduced in the present volume has been photographed from its original presentation.

For ease of use, in addition to the normal continuous pagination, wherever necessary this volume also contains, between square brackets on the inner margin of the pages, the original pagination of the documents reproduced. In the case of the oral arguments, the original pagination is preceded by the number of the verbatim records as issued in a provisional duplicated form and carrying the reference CR 98/--. It is to this pagination within square brackets that one should refer for all cross-references within the texts thus published.

Neither the typography nor the presentation may be used for the purpose of interpreting the texts reproduced.

The Hague, 2000.

Le présent volume reproduit la requête, la demande en indication de mesures conservatoires, les observations orales sur la demande, la requête modifiée, la demande conditionnelle tendant à ce que la Cour rende une ordonnance qui établisse des faits de façon concluante, le mémoire et un choix de la correspondance en l'affaire relative à la *Convention de Vienne sur les relations consulaires (Paraguay c. Etats-Unis d'Amérique).* Cette affaire, inscrite au rôle général de la Cour sous le numéro 99 le 3 avril 1998, en a été rayée par ordonnance de la Cour du 10 novembre 1998 à la suite du désistement du gouvernement demandeur (*Convention de Vienne sur les relations consulaires (Paraguay c. Etats-Unis d'Amérique), ordonnance du 10 novembre 1998, C.I.J. Recueil 1998*, p. 426).

*

Au sujet de la reproduction des dossiers, la Cour a décidé que dorénavant, quel que soit le stade auquel aura pris fin une affaire, ne devront être retenus à fin de publication que les pièces de procédure écrite et les comptes rendus des audiences publiques, ainsi que les seuls documents, annexes et correspondance considérés comme essentiels à l'illustration de la décision qu'elle aura prise. En outre, la Cour a demandé expressément que, chaque fois que les moyens techniques le permettraient, les volumes soient composés de fac-similés des pièces déposées devant elle, en l'état où elles ont été produites par les parties.

De ce fait, le mémoire reproduit dans la présente édition a été photographié d'après sa présentation originale.

En vue de faciliter l'utilisation de l'ouvrage, outre sa pagination continue habituelle le présent volume comporte, en tant que de besoin, entre crochets sur le bord intérieur des pages, l'indication de la pagination originale des pièces reproduites. S'agissant des exposés oraux, la pagination originale est précédée du numéro d'ordre du compte rendu distribué sous forme muticopiée provisoire sous la cote CR 98/--. C'est à ces références entre crochets qu'il faudra se reporter lors de tout renvoi se trouvant dans les textes ainsi publiés.

Ni la typographie ni la présentation ne sauraient être utilisées aux fins de l'interprétation des textes reproduits.

La Haye, 2000.

CONTENTS — TABLE DES MATIÈRES

Page

Application Instituting Proceedings Submitted by the Government of Paraguay — Requête introductive d'instance présentée par le Gouvernement du Paraguay

Preliminary statement 3
I. The facts 4
  Municipal court proceedings concerning Mr. Breard 4
  Paraguay's efforts to secure relief in the United States 5
II. The jurisdiction of the Court 6
III. The claims of the Republic of Paraguay 7
IV. The judgment requested 8
V. Judge *ad hoc* 9
VI. Reservation of rights 9
VII. Provisional measures 9

Request for the Indication of Provisional Measures of Protection Submitted by the Government of Paraguay — Demande en indication de mesures conservatoires présentée par le Gouvernement du Paraguay . . 11

Oral Arguments on the Request for the Indication of Provisional Measures — Plaidoiries relatives à la demande en indication de mesures conservatoires

Opening of the Oral Proceedings 18

Statement by Mr. Cáceres (Paraguay) 21
  Introduction 21
  Attempts to resolve dispute 21
  Introduction of Counsel 21

Argument of Mr. Donovan (Paraguay) 22
  Summary, treaties and jurisdiction 22
    Introduction and summary 22
    Substantive treaty rights at issue 22
    Jurisdiction 22

Argument of Mr. Legum (Paraguay) 24
  Facts 24
    Introduction 24
    The crime and the arrest 24
    The trial and sentence 24
    Post-conviction 25
    Breard's petition to the Supreme Court 26

Argument of Mr. Donovan (Paraguay) 27
  Need for provisional measures 27

Page

STATEMENT BY MR. GOROSTIAGA 30

Conclusions 30
Submission 30

STATEMENT BY MR. ANDREWS (UNITED STATES OF AMERICA) 31

Requirements for indication of provisional measures not met 32
Capital punishment does not violate international law 32
Introduction of Counsel 33

ARGUMENT OF MS BROWN (UNITED STATES OF AMERICA) 34

I. The consular function 34
II. State practice with respect to consular notification 35
III. The United States response to the failure of notification 37

ARGUMENT OF MR. CROOK (UNITED STATES OF AMERICA) 41

I. The significance of provisional measures 41
II. Provisional measures are not warranted in these circumstances . 42
    No jurisdiction 42
    The merits of Paraguay's claim 43
        A. Plain meaning of the text 44
        B. Negotiating history 45
        C. State practice 46
        D. No injury to Mr. Breard 47
        E. Conclusion 47
III. Provisional measures and the rights of the Parties 47

ARGUMENT OF MR. MATHESON (UNITED STATES OF AMERICA) . . . 50

Granting of interim measures is contrary to interests of Vienna Convention parties 50
    Intention of drafters 51
Integrity of domestic criminal process 51

STATEMENT BY MR. ANDREWS (UNITED STATES OF AMERICA) 54

Submissions 54

REPLY OF MR. DONOVAN (PARAGUAY) 55

QUESTION PUT BY THE PRESIDENT 63

REJOINDER OF MR. CROOK (UNITED STATES OF AMERICA) 64

CLOSING OF THE ORAL PROCEEDINGS 67

READING OF THE ORDER 68

Amended Application Instituting Proceedings Submitted by the Government of Paraguay — Requête introductive d'instance modifiée présentée par le Gouvernement du Paraguay

Preliminary statement 73
I. The facts 74

Page

Municipal court proceedings concerning Mr. Breard 74
Paraguay's efforts to secure relief in the United States 76
This Court's Order of provisional measures 77
The United States' execution of Mr. Breard in defiance of the provisional measures Order and Paraguay's rights under the Vienna Convention 77
II. The jurisdiction of the Court 78
III. The claims of the Republic of Paraguay 79
IV. The judgment requested 80
V. Judge *ad hoc* 81
VI. Reservation of rights 81

Conditional Request of Paraguay for an Order Conclusively Establishing Facts — Demande conditionnelle du Paraguay tendant à ce que la Cour rende une ordonnance qui établisse des faits de façon concluante

By executing Mr. Breard, the United States deprived Paraguay of his testimony 85
If this Court holds that Paraguay must show prejudice, it should also hold that prejudice has been conclusively established 86
Relief requested 88

Memorial of Paraguay — Mémoire du Paraguay

CHAPTER 1. INTRODUCTION 91

CHAPTER 2. FACTS 95

The arrest and failure of notification 95
The plea offer, trial, conviction, and sentence 96
Appellate and *habeas* proceedings in the Virginia courts 100
Mr. Breard's *habeas* proceeding in the federal courts 101
Paraguay's action in the federal courts 102
Judgments of the district court and the Court of Appeals in the *habeas* proceeding and Paraguay's action 103
Setting of the execution date and commencement of proceedings in the United States Supreme Court 104
Diplomatic negotiations 105
Paraguay's Application to the Court and request for provisional measures of protection 106
Response of the United States to the provisional measures Order . . 107
Post-execution letters 112

CHAPTER 3. THE COURT HAS JURISDICTION OVER PARAGUAY'S CLAIMS 113

I. The Optional Protocol gives this Court jurisdiction over any dispute arising out of the application or interpretation of the Convention 113
II. The Court has jurisdiction over the dispute arising from the United States' breach of Article 36 (1) 115
III. The Court has jurisdiction over the dispute arising from the United States' breach of Article 36 (2) 117
IV. The Court has jurisdiction over the dispute arising from the United States' breach of the provisional measures Order 118

Page

CHAPTER 4. THE UNITED STATES VIOLATED THE VIENNA CONVENTION ON CONSULAR RELATIONS 123

I. The United States deprived Paraguay of its right to provide consular assistance by failing to provide the required notification to Mr. Breard 127

A. Article 36 (1) *(b)* required notification to Mr. Breard in order to permit Paraguay to exercise its right of consular assistance 127
B. The United States did not provide the requisite notice 130
C. The United States' violation renders it internationally responsible for its wrongful acts 131

1. No prejudice need be shown for State responsibility to attach 132
2. Prejudice is amply established on this record in any event . 133
a. Injury to Paraguay 133
b. Injury to Paraguay's national 135

II. The United States violated the Vienna Convention by its application of the municipal-law doctrine of procedural default 138

A. The United States was obligated to apply municipal law so as to guarantee the exercise of the rights accorded by Article 36 of the Vienna Convention 139
B. The United States breached its international obligations by applying the doctrine of procedural default in Mr Breard's case 141

CHAPTER 5. BY EXECUTING MR. BREARD, THE UNITED STATES VIOLATED A BINDING ORDER OF THIS COURT 145

I. The United States violated the Order of provisional measures . . 147
II. The Order of provisional measures was binding on the United States 152

A. Article 94 (1) of the Charter requires the parties to comply with an indication of provisional measures 153
B. The ordinary meaning of Article 41 in its context establishes that an indication of provisional measures is binding 154

1. The English text of Article 41 (1) 156

a. "The Court shall have the power . . ." 156
b. ". . . to indicate . . ." 159
c. ". . . if it considers that the circumstances so require . . ." 160
d. ". . . any provisional measures which ought to be taken to preserve the respective rights of either party" 160

2. The other authentic texts of Article 41 (1) 161
3. Article 41 (2) 163

C. The object and purpose of both Article 41 standing alone and the Statute of the Court taken as a whole require that provisional measures be binding 165

1. A nonbinding indication of provisional measures cannot preserve the rights of the requesting party 165
2. A nonbinding indication of provisional measures cannot preserve the Court's ability to resolve disputes in accordance with law 167

Page

D. The interpretation of Article 41 must also take into account the rule that the parties to a judicial proceeding have an obligation to preserve the subject matter 170
E. The circumstances of the adoption of Article 41 confirm that an indication of provisional measures is binding 173
F. The Court must consider the ordinary meaning, context, object and purpose, relevant rules, and adoption history as they inform interpretation today 176

CHAPTER 6. PARAGUAY IS ENTITLED TO APPROPRIATE AND MEANINGFUL REMEDIES 177

I. Paraguay is entitled to a declaration that the United States violated Paraguay's rights under the Vienna Convention 178
II. Paraguay is entitled to an Order of non-repetition 178
III. Paraguay was entitled to *restitutio in integrum* 180
IV. Given the United States violation of the Order, making *restitutio in integrum* impossible, Paraguay is entitled to alternative reparation 183

SUBMISSIONS 185

List of Annexes to the Memorial of Paraguay 188

Correspondence — Correspondance 191

APPLICATION INSTITUTING PROCEEDINGS SUBMITTED BY THE GOVERNMENT OF PARAGUAY

REQUÊTE INTRODUCTIVE D'INSTANCE PRÉSENTÉE PAR LE GOUVERNEMENT DU PARAGUAY

On behalf of the Republic of Paraguay and in accordance with Article 40, paragraph 1, of the Statute of the Court and Article 38 of the Rules of Court, I respectfully submit this Application instituting proceedings in the name of the Government of the Republic of Paraguay against the Government of the United States of America for violations of the Vienna Convention on Consular Relations (done on 24 April 1963) (the "Vienna Convention"). The Court has jurisdiction pursuant to Article I of the Vienna Convention's Optional Protocol concerning the Compulsory Settlement of Disputes.

PRELIMINARY STATEMENT

1. Article 36, subparagraph 1 *(b)*, of the Vienna Convention requires the competent authorities of a State party to advise, "without delay", a national of another State party whom such authorities arrest or detain of the national's right to consular assistance guaranteed by Article 36:

> "[I]f he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner." *(Ibid.)*

2. As the Government of the United States stated in its Memorial in the case concerning *United States Diplomatic and Consular Staff in Tehran*:

> "a principal function of the consular officer is to provide varying kinds of assistance to nationals of the sending State, and for this reason the channel of communication between consular officers and nationals must at all times remain open. Indeed, such communication is so essential to the exercise of consular functions that its preclusion would render meaningless the entire establishment of consular relations. [. . .] Article 36 establishes rights not only for the consular officer but, perhaps even more importantly, for the nationals of the sending State who are assured access to consular officers and through them to others." (*I.C.J. Pleadings*, p. 174 [references omitted].)

3. In 1992, the authorities of the Commonwealth of Virginia, one of the federated states comprising the United States, detained a Paraguayan citizen named Angel Francisco Breard. Without advising Mr. Breard of his right to consular assistance, or notifying Paraguayan consular officers of his detention, as required by the Vienna Convention, such authorities tried and convicted Mr. Breard and sentenced him to death.

4. These actions violated the obligations owed by the United States to Paraguay under the Vienna Convention. As a result of the breach, Paraguay is entitled to *restitutio in integrum*: the re-establishment of the situation that existed before the United States failed to provide the notifications and permit the consular assistance required by the Convention.

I. THE FACTS

Municipal Court Proceedings concerning Mr. Breard

5. On 1 September 1992, law enforcement authorities of Virginia arrested Mr. Breard on suspicion of murder. Although aware of Mr. Breard's Paraguayan nationality, the authorities at no time informed Mr. Breard of his rights to consular assistance under Article 36, subparagraph 1 *(b)*, of the Vienna Convention. Nor did the authorities ever advise Paraguayan consular officers of Mr. Breard's detention. Unaware of, and not having been apprised of, these rights, Mr. Breard could not and did not exercise them before his trial.

6. Had Mr. Breard been properly informed of his rights under the Vienna Convention, he would have communicated with his Consul, seeking the assistance provided for in Article 36. In turn, Paraguay would have rendered that assistance.

7. The failure to provide the notification required by the Vienna Convention thus precluded Paraguay from protecting its interests in the United States as provided for in Articles 5 and 36 of the Vienna Convention. Among other things, Paraguay could not contact its national, assist in the defence of its national (as described in paragraphs 8 and 10 below), monitor the conditions of its national's detention, or ensure that international legal norms were respected in the treatment of, and proceedings against, its national.

8. The failure to provide the required notification also precluded Paraguay from protecting its national's interests in the United States as provided for in Articles 5 and 36 of the Vienna Convention. The authorities of Virginia effectively prevented Paraguayan consular officers from arranging for appropriate legal representation of Mr. Breard. Instead, the authorities themselves arranged for Mr. Breard to be represented by court-appointed counsel who were unfamiliar with Paraguayan culture and with the preconceptions concerning the criminal justice system that a Paraguayan national might be expected to have.

9. As a result of the lack of consular assistance, Mr. Breard made a number of objectively unreasonable decisions during the criminal proceedings against him, which were conducted without translation. He refused to accept the authorities' offer of life in prison in exchange for his pleading guilty to the crime. Instead, Mr. Breard insisted on risking a death sentence and confessing and denouncing his past criminal conduct at trial. Mr. Breard took these highly detrimental steps because — in the absence of advice from his consulate — he did not comprehend the fundamental differences between the criminal justice systems of the United States and Paraguay. Whereas Mr. Breard believed his confession and denunciation would appeal to the mercy of the American court, as he understood they would a court in Paraguay, in reality these acts virtually assured Mr. Breard's conviction and death sentence.

10. Consular assistance would have included advice on cultural and legal differences between Paraguay and the United States, including the desirability of accepting or rejecting plea offers in light of those differences; an interpreter; appropriate additional or other legal counsel; identifying and communicating with family members who could provide assistance and information; supplying records, documents, and other evidence helpful to Mr. Breard's defence; transport of family members and other witnesses to Virginia to provide testimony; attendance by consular officers at court or other proceedings; collecting and presenting mitigating evidence at the sentencing phase; and other forms of assistance both legal and non-legal. Such consular assistance would have

affected the result of the criminal proceeding against Mr. Breard, including any sentence imposed.

11. On 24 June 1993, Mr. Breard was convicted of murder. On 22 August 1993, the trial court imposed a death sentence. Mr. Breard's direct appeals of the conviction and sentence were denied, as was his petition to the state courts for a writ of *habeas corpus*, a collateral proceeding seeking relief from unlawful detention.

12. In the spring of 1996, Paraguay, without benefit of information from the authorities of Virginia and the United States, finally learned that Mr. Breard was imprisoned in the United States and awaiting execution. Immediately upon learning of his situation, Paraguay, through its embassy and consulate, began rendering assistance, both legal and otherwise, to Mr. Breard. Until contacted by the Paraguayan consular representatives at that time, Mr. Breard had been entirely unaware of his rights under the Vienna Convention.

13. On 30 August 1996, with the assistance of Paraguayan consular officers, Mr. Breard took the final step available to him for challenging his conviction and sentence by filing a petition to the federal court of first instance for a writ of *habeas corpus*. For the first time, Mr. Breard claimed violations of the Vienna Convention. That court rejected the assertion of this and other claims based on a municipal law doctrine of "procedural default" (*Breard* v. *Netherland*, 949 F. Supp. 1255 (E.D. Va. 1996)). Applying this doctrine, the court decided that, because Mr. Breard had not asserted his rights under the Vienna Convention in his previous legal proceedings, he could not assert them in the federal *habeas* proceeding. This municipal law doctrine was held to bar such relief even though, first, Mr. Breard was unaware of his rights under the Convention at the time of the earlier legal proceedings, and second, he was unaware of his rights precisely because the local authorities failed to comply with their obligations under the Convention promptly to inform him of those rights. The intermediate federal appellate court affirmed (*Breard* v. *Pruett*, 134 F. 3d 615 (4th Cir. 1998)). Mr. Breard's appeal to the intermediate federal appellate court was the last means of legal recourse in the United States available to him as of right.

14. In light of the federal appellate court's affirmance of the federal trial court's denial of Mr. Breard's *habeas* petition, the Virginia court that sentenced Mr. Breard has set an execution date of 14 April 1998. Absent intervention, officials of Virginia will then, in the words of the authorizing statute, "cause the prisoner under sentence of death to be electrocuted or injected with a lethal substance until he is dead" (*Va. Stat. Ann.* § 53.1-234).

15. By petition for a writ of *certiorari*, Mr. Breard has now requested that the United States Supreme Court exercise its discretionary authority to review the lower federal courts' decision against him and grant a stay of his execution pending that review. The Supreme Court grants less than 5 per cent of all *certiorari* petitions submitted to it. Moreover, in cases, such as Mr. Breard's, involving an imminent execution and submitted on an expedited basis, the Court frequently does not rule on the petition and accompanying request for interim relief until days, or even hours, before the scheduled execution.

Paraguay's Efforts to Secure Relief in the United States

16. On 16 September 1996, the Republic of Paraguay filed its own civil lawsuit in a federal court of first instance against the municipal officials responsible for Mr. Breard's arrest, conviction, continuing imprisonment, and pending execution, alleging violations of the Vienna Convention. Paraguay sought,

among other relief, an order vacating Mr. Breard's conviction, barring the municipal officials from taking any future actions based on that conviction, including refraining from putting Mr. Breard to death, and requiring those officials to afford Paraguay its rights under the Convention in any future proceedings should Virginia, as Paraguay would expect, seek to prosecute Mr. Breard anew.

17. Paraguay did not seek from the federal court of first instance, and does not intend to seek from this Court, any relief barring the competent authorities of the United States from enforcing its criminal law or, specifically, retrying Mr. Breard if the competent authorities are so advised. Paraguay does contend, however, that the competent authorities of the United States must enforce the criminal law by means that comport with the obligations undertaken by the United States in the Vienna Convention.

18. On 27 November 1996, without having considered the merits of Paraguay's claim, the federal court of first instance held that it could not take jurisdiction of the case because it was barred by a municipal doctrine providing sovereign immunity to the several states that comprise the United States (*Paraguay* v. *Allen*, 949 F. Supp. 1269 (E.D. Va. 1996)). Paraguay appealed the decision, which was affirmed (*Paraguay* v. *Allen*, 134 F. 3d 622 (4th Cir. 1998)). During the appellate proceedings, the United States took the position that although the Vienna Convention is of great importance to United States nationals abroad, the issue of its own violation of the Convention was not justiciable in the courts of the United States in an action brought by another State party to the Convention.

19. Paraguay has filed a petition for a writ of *certiorari* in the United States Supreme Court seeking review of the appellate decision. As explained above, a petition for *certiorari* is a matter of the Supreme Court's discretion and is rarely granted.

20. In addition to its efforts to have its claim heard in the courts of the United States, Paraguay has also engaged in diplomatic efforts to gain the assistance of the United States in remedying the effect of the breach of the Vienna Convention. In a letter dated 10 December 1996, the Ambassador of Paraguay sought the good offices of the United States Department of State,

> "in order that a new trial may be granted Paraguayan citizen Angel Breard within the framework of constitutional guarantees for proper defense against a criminal accusation as well as the strict fulfillment of the stipulations of international treaties covering acts of such nature".

In a response delivered 3 June 1997, the Department of State expressed disagreement with Paraguay's legal position and offered no assistance to Paraguay in exercising its rights under the Treaties.

II. THE JURISDICTION OF THE COURT

21. Under Article 36, paragraph 1, of the Statute of the Court, "[t]he jurisdiction of the Court comprises . . . all matters specially provided for . . . in treaties and conventions in force".

22. The Republic of Paraguay and the United States are, as Members of the United Nations, parties to the Statute, and are parties to the Vienna Convention and to its Optional Protocol concerning the Compulsory Settlement of Disputes. Article I of the Optional Protocol provides:

> "Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol."

23. Paraguay therefore submits that, upon the filing of the present Application, the matters in dispute between Paraguay and the United States concerning Paraguay's claims under the Vienna Convention lie within the compulsory jurisdiction of the Court.

III. The Claims of the Republic of Paraguay

24. The Government of the Republic of Paraguay claims that :

(a) Pursuant to Article 36, subparagraph 1 *(b)*, of the Vienna Convention, the United States is under the international legal obligation to Paraguay, a State party to the Convention, to inform "without delay" any Paraguayan national, such as Mr. Breard, who is "arrested or committed to prison or to custody pending trial or is detained in any other manner" of his rights under that subparagraph. These rights include :

  (i) the right, if the national arrested or detained so requests, to have the competent authorities of the receiving State inform the local consular post of the sending State that that State's national has been so arrested or committed to prison or to custody pending trial or detained in any other manner ;

  (ii) the right to have the competent authorities of the receiving State forward any communication "addressed to the consular post from the person arrested, in prison, custody or detention . . . without delay".

  The United States has violated and is currently violating the foregoing obligations.

(b) Pursuant to Article 36, subparagraph 1 *(b)*, of the Vienna Convention, the United States is under the international legal obligation to an arrested national of Paraguay, such as Mr. Breard, to inform him "without delay" of his rights under that subparagraph. These rights include :

  (i) the right, if the national arrested or detained so requests, to have the competent authorities of the receiving State inform the local consular post of the sending State that that State's national has been so arrested or committed to prison or to custody pending trial or detained in any other manner ;

  (ii) the right to have the competent authorities of the receiving State forward any communication "addressed to the consular post from the person arrested, in prison, custody or detention . . . without delay".

  The United States has violated and is currently violating the foregoing obligations with respect to Mr. Breard.

(c) Pursuant to Article 36 of the Vienna Convention, the United States is under the international legal obligation to ensure that Paraguay can communicate with and assist an arrested national prior to trial. Its failure to provide the notifications required by Article 36, subparagraph 1 *(b)*, of the Vienna Convention has effectively prevented Paraguay from exercising its right to carry out consular functions pursuant to Articles 5 and 36 of

the Convention. The United States therefore has violated and is currently violating the foregoing obligation.

(d) Pursuant to Article 36, paragraph 2, of the Vienna Convention and Article 26 of the Vienna Convention on the Law of Treaties (done on 23 May 1969), the United States is under an international legal obligation to ensure that its municipal law and regulations enable full effect to be given to the purposes of the rights accorded under Article 36. The United States has violated and is currently violating the foregoing obligation.

(e) Pursuant to Article 27 of the Vienna Convention on the Law of Treaties and to customary international law, the United States may not derogate from its international legal obligation to uphold the Vienna Convention based upon its municipal law doctrines and rules, nor upon the basis that the acts in derogation are those of a subordinate organ or constituent or judicial power. The United States has violated and is currently violating the foregoing obligation.

IV. THE JUDGMENT REQUESTED

25. Accordingly, the Republic of Paraguay asks the Court to adjudge and declare:

(1) that the United States, in arresting, detaining, trying, convicting, and sentencing Angel Francisco Breard, as described in the preceding statement of facts, violated its international legal obligations to Paraguay, in its own right and in the exercise of its right of diplomatic protection of its national, as provided by Articles 5 and 36 of the Vienna Convention;
(2) that Paraguay is therefore entitled to *restitutio in integrum*;
(3) that the United States is under an international legal obligation not to apply the doctrine of "procedural default" or any other doctrine of its internal law, so as to preclude the exercise of the rights accorded under Article 36 of the Vienna Convention; and
(4) that the United States is under an international legal obligation to carry out in conformity with the foregoing international legal obligations any future detention of or criminal proceedings against Angel Francisco Breard or any other Paraguayan national in its territory, whether by a constituent, legislative, executive, judicial or other power, whether that power holds a superior or a subordinate position in the organization of the United States, and whether that power's functions are of an international or internal character;

and that, pursuant to the foregoing international legal obligations,

(1) any criminal liability imposed on Angel Francisco Breard in violation of international legal obligations is void, and should be recognized as void by the legal authorities of the United States;
(2) the United States should restore the *status quo ante*, that is, re-establish the situation that existed before the detention of, proceedings against, and conviction and sentencing of Paraguay's national in violation of the United States' international legal obligations took place; and
(3) the United States should provide Paraguay a guarantee of the non-repetition of the illegal acts.

V. JUDGE *AD HOC*

26. In accordance with the provisions of Article 31 of the Statute and Article 35, paragraph 1, of the Rules, the Republic of Paraguay declares its intention to exercise its right to name a judge *ad hoc*.

VI. RESERVATION OF RIGHTS

27. The Republic of Paraguay reserves the right to modify and extend the terms of this Application, as well as the grounds invoked.

VII. PROVISIONAL MEASURES

28. The Republic of Paraguay requests that the Court indicate interim measures of protection, as set forth in a separate request filed concurrently with this Application.

Brussels, 3 April 1998.

(*Signed*) Manuel Maria CACERES,
Ambassador of the Republic of Paraguay
to the Kingdom of the Netherlands.

REQUEST FOR THE INDICATION OF PROVISIONAL MEASURES OF PROTECTION SUBMITTED BY THE GOVERNMENT OF PARAGUAY

DEMANDE EN INDICATION DE MESURES CONSERVATOIRES PRÉSENTÉE PAR LE GOUVERNEMENT DU PARAGUAY

Brussels, 3 April 1998.

1. I have the honour to refer to the Application submitted to the Court this day instituting proceedings in the name of the Republic of Paraguay against the Government of the United States of America and to submit, in accordance with Article 41 of the Statute of the Court and Articles 73, 74, and 75 of the Rules of Court, an urgent request that the Court indicate provisional measures to preserve the rights of the Republic of Paraguay. The Court has jurisdiction pursuant to Article I of the Optional Protocol Concerning the Compulsory Settlement of Disputes to the Vienna Convention on Consular Relations.

2. The compelling facts underlying this request are set forth in the Application. On 1 September 1992, law enforcement officials of the Commonwealth of Virginia, one of the United States of America, arrested a national of Paraguay, Angel Francisco Breard. Mr. Breard was subsequently convicted and sentencted to death. At no time did these officials inform Mr. Breard of his right to communicate with his consulate, as required under Article 36 of the Vienna Convention. Mr. Breard was and thus remained unaware of his rights under the Convention. As a result, Paraguay was not alerted to Mr. Breard's situation and was unable to exercise its right to render consular assistance until after he had already been tried, convicted, and sentenced.

3. Paraguay was therefore unable to protect its interests as provided for in Articles 5 and 36 of the Vienna Convention. Similarly, it was unable to protect its detained national's interests as provided for in those Articles.

4. As set forth in the Application, Paraguay submits that the actions of the Virginia officials, attributable to the United States, violated international legal obligations that the United States owes to Paraguay in its own right and in the exercise of its right of diplomatic protection of its national. As further set forth in the Application, Paraguay has requested that the Court declare that the United States has violated its obligations under the Vienna Convention; that the United States is obligated to restore the *status quo ante*; and that the United States is obligated to ensure that any future detention of or criminal proceedings against Mr. Breard or any other Paraguayan national in its territory be carried out in conformity with the international legal obligations the United States owes Paraguay.

5. By order dated 25 February 1998, the Circuit Court of Arlington County, Virginia, United States of America, has ordered that on 14 April 1998, pursuant to Virginia Code § 53.1-234, Mr. Breard be electrocuted or injected with a lethal substance until he is dead.

6. The importance and sanctity of an individual human life are well established in international law. As recognized by Article 6 of the International Covenant on Civil and Political Rights, every human being has the inherent right to life and this right shall be protected by law.

7. Under the grave and exceptional circumstances of this case, and given the paramount interest of Paraguay in the life and liberty of its nationals, provisional measures are urgently needed to protect the life of Paraguay's national and the ability of this Court to order the relief to which Paraguay is entitled: restitution in kind. Without the provisional measures requested, the United States will execute Mr. Breard before this Court can consider the merits of Paraguay's claims, and Paraguay will be forever deprived of the opportunity to have the *status quo ante* restored in the event of a judgment in its favour.

8. On belhaf of the Government of Paraguay, I therefore respectfully request that, pending final judgment in this case, the Court indicate:

(a) that the Government of the United States take the measures necessary to ensure that Mr. Breard not be executed pending the disposition of this case;
(b) that the Government of the United States report to the Court the actions it has taken in pursuance of subparagraph *(a)* immediately above and the results of those actions; and
(c) that the Government of the United States ensure that no action is taken that might prejudice the rights of the Republic of Paraguay with respect to any decision this Court may render on the merits of the case.

9. In view of the extreme gravity and immediacy of the threat that authorities in the United States will execute a Paraguayan citizen in violation of obligations the United States owes to Paraguay, Paraguay respectfully asks the Court to treat this request as a matter of the greatest urgency.

10. The Government of the Republic of Paraguay has authorized the undersigned to appear before the Court in any proceedings or hearings relating to this request that the Court may convene in accordance with the terms of Article 74, paragraph 3, of the Rules of Court.

(Signed) His Excellency Manuel Maria CACERES,
Ambassador of the Republic of Paraguay to
the Kingdom of the Netherlands.

ORAL ARGUMENTS ON THE REQUEST FOR THE INDICATION OF PROVISIONAL MEASURES

MINUTES OF THE PUBLIC SITTINGS

held at the Peace Palace, The Hague, on 7 and 9 April 1998,
Vice-President Weeramantry, Acting President,
presiding

PLAIDOIRIES RELATIVES À LA DEMANDE EN INDICATION DE MESURES CONSERVATOIRES

PROCÈS-VERBAUX DES AUDIENCES PUBLIQUES

tenues au Palais de la Paix, à La Haye, les 7 et 9 avril 1998,
sous la présidence de M. Weeramantry, vice-président,
faisant fonction de président

FIRST PUBLIC SITTING (7 IV 98, 10 a.m.)

Present : Vice-President Weeramantry, *Acting President* ; *President* Schwebel ; *Judges* Oda, Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek ; *Registrar* Valencia-Ospina.

Also present :

For the Government of the Republic of Paraguay :

H.E. Mr. Manuel Maria Cáceres, Ambassador of the Republic of Paraguay to the Kingdom of Belgium and the Kingdom of the Netherlands, Brussels, *as Agent* ;

Mr. Donald Francis Donovan, Debevoise & Plimpton, New York,
Mr. Barton Legum, Debevoise & Plimpton, New York,
Mr. José Emilio Gorostiaga, Professor of Law at the University of Paraguay in Asunción and Legal Counsel to the Office of the President of Paraguay, *as Counsel and Advocates* ;

Mr. Daniel C. Malone, Debevoise & Plimpton, New York, *as Counsel.*

For the Government of the United States of America :

Mr. David R. Andrews, Legal Adviser, United States Department of State, *as Agent* ;

Mr. Michael J. Matheson, Deputy Legal Adviser, United States Department of State, *as Co-Agent* ;

Mr. John R. Crook, Assistant Legal Adviser for United Nations Affairs, United States Department of State,
Ms Catherine Brown, Assistant Legal Adviser for Consular Affairs, United States Department of State, *as Counsel and Advocates* ;

Mr. Sean D. Murphy, Legal Counsellor, United States Embassy, The Hague,
Mr. Robert J. Ericson, United States Department of Justice, *as Counsel.*

OPENING OF THE ORAL PROCEEDINGS

The **VICE-PRESIDENT**, Acting President : The Court meets today, pursuant to Article 74, paragraph 3, of the Rules of Court, to hear the observations of the Parties on the request for the indication of provisional measures submitted by the Republic of Paraguay in the case concerning the *Vienna Convention on Consular Relations (Paraguay* v. *United States of America)*.

Article 32, paragraph 1, of the Rules of Court provides that, if the President of the Court is a national of one of the parties to a case, he shall not exercise the functions of the presidency in respect of that case. The President of the Court, Judge Schwebel, will therefore not be exercising the functions of the presidency in this case and it falls to me, in my capacity as Vice-President of the Court, to do so, in accordance with Article 13 of the Rules of Court.

The proceedings were instituted on 3 April 1998 by the filing in the Registry of the Court of an application by the Government of the Republic of Paraguay against the United States of America. In that Application, the Government of Paraguay refers, as a basis for the Court's jurisdiction, to Article I of the Optional Protocol Concerning the Compulsory Settlement of Disputes to the Vienna Convention on Consular Relations of 24 April 1963.

Paraguay claims that the United States has acted in violation of obligations owed to Paraguay under Article 34, subparagraph 1 *(b)*, of the Vienna Convention on Consular Relations. It contends that,

> "In 1992, the authorities of the Commonwealth of Virginia, one of the federated states comprising the United States, detained a Paraguayan citizen named Angel Francisco Breard. Without advising Mr. Breard of his right to consular assistance, or notifying Paraguayan consular officers of his detention, as required by the Vienna Convention, such authorities tried and convicted Mr. Breard and sentenced him to death"

and asks the Court for *restitutio in integrum*, or

> "the re-establishment of the situation that existed before the United States failed to provide the notifications and permit the consular assistance required by the Convention".

I will now ask the Registrar to read out the decision requested of the Court, as formulated in paragraph 25 of the Application of Paraguay :

The **REGISTRAR** :

> "The Republic of Paraguay asks the Court to adjudge and declare :
>
> (1) that the United States, in arresting, trying, convicting and sentencing Angel Francisco Breard, as described in the preceding statement of facts, violated its international legal obligations to Paraguay, in its own right and in the exercise of its right of diplomatic protection of its national, as provided by Articles 5 and 36 of the Vienna Convention ;
>
> (2) that Paraguay is therefore entitled to *restitutio in integrum* ;

(3) that the United States is under an international legal obligation not to apply the doctrine of 'procedural default', or any other doctrine of its international law, so as to preclude the exercise of the rights accorded under Article 36 of the Vienna Convention ; and

(4) that the United States is under an international legal obligation to carry out in conformity with the foregoing international legal obligations any future detention of or criminal proceedings against Angel Francisco Breard or any other Paraguayan national in its territory, whether by a constituent, legislative, executive, judicial or other power, whether that power holds a superior or a subordinate position in the organization of the United States, and whether that power's functions are of an international or internal character ;

and that, pursuant to the foregoing international legal obligations,

(1) any criminal liability imposed on Angel Francisco Breard in violation of international legal obligations is void, and should be recognized as void by the legal authorities of the United States ;

(2) the United States should restore the *status quo ante*, that is re-establish the situation that existed before the detention of, proceedings against, and conviction and sentencing of Paraguay's national in violation of the United States' international legal obligations took place ; and

(3) the United States should provide Paraguay a guarantee of the non-repetition of the illegal acts."

The **VICE-PRESIDENT** : Immediately after the filing of the Application, on 3 April 1998, the Agent of Paraguay filed in the Registry of the Court a request for the indication of provisional measures pursuant to Article 73 of the Rules of Court. Paraguay stated, in that request, that

> "By order dated 25 February 1998, the Circuit Court of Arlington County, Virginia, United States of America, has ordered that on 14 April 1998, pursuant to Virginia Code § 53.1-234, Mr. Breard be electrocuted or injected with a lethal substance until he is dead."

Paraguay further indicated that

> "Under the grave and exceptional circumstances of this case, and given the paramount interest of Paraguay in the life and liberty of its nationals, provisional measures are urgently needed to protect the life of Paraguay's national and the ability of this Court to order the relief to which Paraguay is entitled: restitution in kind. Without the provisional measures requested, the United States will execute Mr. Breard before this Court can consider the merits of Paraguay's claims, and Paraguay will be forever deprived of the opportunity to have the *status quo ante* restored in the event of a judgment in its favour."

It asked the Court to treat the matter as one of "the greatest urgency" in view of "the extreme gravity and immediacy of the threat".

I will now ask the Registrar to read out the provisional measures which the Agent of Paraguay, in paragraph 8 of the request, asks the Court to indicate.

The **REGISTRAR** :

> "On behalf of the Government of Paraguay I therefore respectfully request that, pending final judgment in this case, the Court indicate :

(a) that the Government of the United States take the measures necessary to ensure that Mr. Breard not be executed pending the disposition of this case;

(b) that the Government of the United States report to the Court the actions it has taken in pursuance of subparagraph *(a)* immediately above and the results of those actions; and

(c) that the Government of the United States ensure that no action is taken that might prejudice the rights of the Republic of Paraguay with respect to any decision this Court may render on the merits of the case."

The VICE-PRESIDENT: Immediately upon the filing of the request, the certified copy of the request for the indication of provisional measures to which reference is made in Article 73, paragraph 2, of the Rules of Court, was transmitted to the Government of the United States.

Immediately upon the filing of the request, letters were sent by the Vice-President of the Court to each of the Parties, pursuant to Article 74, paragraph 4, of the Rules of Court, drawing their attention to the need to act in such a way as to enable any Order the Court might make on the request for provisional measures to have its appropriate effects.

According to Article 74 of the Rules of Court, a request for the indication of provisional measures "shall have priority over all other cases" and if the Court is not sitting when the request is made, it is to be convened forthwith for the purpose of proceeding to a decision on that request. Moreover, the date of the oral proceedings must be fixed in such a way as to afford the Parties the opportunity of being represented at it. Consequently, following a meeting held between the Vice-President and the representatives of both Parties on the date the request was filed, the Parties were informed that the date for the oral proceedings contemplated by Article 74, paragraph 3, of the Rules of Court, during which they could present their observations on the request for the indication of provisional measures, had been fixed as 7 April 1998 at 10 a.m.

I note the presence in Court of Agents and Counsel of the two Parties. The Court will first hear the Republic of Paraguay, the Applicant on the merits and the State which has requested the indication of provisional measures. I accordingly give the floor to His Excellency Mr. Manuel Cáceres, Agent of Paraguay.

STATEMENT BY MR. CÁCERES

AGENT FOR THE GOVERNMENT OF PARAGUAY

Mr. CÁCERES: Mr. President, Mr. Vice-President and distinguished Members of the Court. My name is Manuel María Cáceres. I am the Agent for the Government of the Republic of Paraguay in this case.

Paraguay recognizes the busy schedule of this Court. Paraguay therefore deeply appreciates the Court's willingness to convene on this request for provisional measures on such short notice.

Paraguay further recognizes that, given that its national, Angel Francisco Breard, is scheduled to be executed exactly one week from today, the Court must act with great alacrity if its decision on Paraguay's request for provisional measures is to have any effect. Again, Paraguay deeply appreciates the deliberative efforts that the Court and its Members will now be required to devote to our request.

I therefore wish to assure the Court that Paraguay has filed this Application and asserted this request for provisional measures only after exhaustive efforts to resolve this dispute without the intervention of this Court. As detailed in Paraguay's Application, Paraguay has attempted to resolve the dispute not only through diplomatic negotiations, but also by taking the unusual step of pursuing relief through the municipal court system of the United States of America. None of these avenues has proved fruitful.

Just last week, Paraguay and the United States resumed efforts in the form of a series of high-level meetings in Asunción, which both parties hoped would make it possible to avoid recourse to this Court.

To our regret, however, no resolution has been achieved. Thus, as the Court knows, we initiated proceedings last Friday and have asked the Court to indicate provisional measures that will ensure that Paraguay's national is not executed during the pendency of these proceedings.

To make Paraguay's oral submission in support of its Application for provisional measures, I now introduce Professor José Emilio Gorostiaga, Professor of Law at the University of Paraguay and Legal Counsel to the Office of the President of Paraguay. I also introduce Mr. Donald Francis Donovan of Debevoise & Plimpton in New York, Mr. Barton Legum, also of Debevoise & Plimpton in New York, and Mr. Daniel Malone, of the same law firm.

Mr. Donovan will commence our oral submissions.

ARGUMENT OF MR. DONOVAN

COUNSEL FOR THE GOVERNMENT OF PARAGUAY

Mr. DONOVAN: Mr. President, Mr. Vice-President, and distinguished Members of the Court.

We are acutely aware of the time pressure under which the Court takes up this matter in light of the scheduled execution of Angel Francisco Breard, Paraguay's national, on 14 April, this coming Tuesday. In our scheduling meeting on Friday, the Court made it clear that it wished us to keep our oral submissions as brief as possible, and if at all possible to no more than one hour. We will certainly respect that request.

This case facilitates a succinct submission. As it arrives at this Court, the case presents a straightforward dispute both as a matter of the underlying facts and of the governing principles of law. We believe as well that the circumstances relevant to our request for provisional measures — most importantly, of course, the impending execution — are also plain to see. Accordingly, we are confident that the need for real expedition in this matter will not in any way compromise the Parties' opportunity to present their observations to the Court.

I will begin Paraguay's oral submissions by setting forth the treaty provisions from which Paraguay's claims arise and the jurisdictional basis for those claims.

My colleague Mr. Legum will then set forth the facts out of which the claims arise.

I will then address the request for provisional measures in light of the present posture of the dispute.

And finally, Dr. Gorostiaga will briefly elaborate on the importance Paraguay attaches to the interests at stake in this matter.

Paraguay bases its Application in this Court on the Vienna Convention on Consular Relations, to which both Paraguay and the United States are parties. The Convention, as this Court well knows, is the modern cornerstone of consular rights and privileges, but it is a cornerstone that rests on centuries of accumulated experience.

Article 5 *(e)* of the Vienna Convention includes protecting the interests of a sending State's nationals and providing consular assistance to nationals of the State as among the consular functions protected by the Convention.

Article 36 implements certain provisions of Article 5 *(e)* in the case of detained nationals. Paragraph 1 of Article 36 provides a detailed procedural mechanism to be followed in all cases where a national is detained by another State party.

Subparagraph *(a)* of paragraph 1 establishes the guiding principle of free consular access — that is, consular officers of the sending State must have free access to and communication with nationals of that State, and nationals must have free access to and communication with their consular officers. That is the very basis of the means by which consular assistance is provided.

Subparagraph *(b)* establishes the precise procedure to be followed when a national of the sending State is detained by the competent authorities of the receiving State. Specifically, the authorities of the receiving State must "without delay" inform the national of his or her right to consular assistance and to have the consul advised of the detention. Further, if the national so requests, the authorities must "without delay" inform the consular post of the sending

State. Finally, any communication by the national to the consular post must be forwarded to the authorities, again "without delay".

Subparagraph *(c)* describes the consular officers' procedural rights with respect to detained nationals. They have the right to visit, to correspond and to converse, and to arrange for legal representation.

Paragraph 2 of Article 36 provides that all of these rights "shall be exercised in conformity with the laws and regulations of the receiving State". That provision, however, is subject to the proviso that "the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under the Article are intended". Thus, while States have the authority to regulate the means by which consular rights are exercised, the municipal laws and regulations cannot operate to deprive the consular officers or the national of the rights granted. To the contrary, the provisio — which was adopted over an alternative that would have permitted substantial dilution, by way of municipal law requirements, of the rights granted — makes clear that municipal law must ensure that "full effect" be given to such rights.

I should point out that Article 36 in Paraguay's view creates rights not only for the State party, but also for the detained national.

As the Court will have noted, Paraguay in this case seeks redress for both categories of rights. It brings the action on its own behalf for violations of rights owed to it, and it also brings the action in the exercise of diplomatic protection in light of the breach of duties owed to its national.

Finally, the Vienna Convention includes an Optional Protocol, again to which both Paraguay and the United States are parties.

Article I of the Protocol provides that "[d]isputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction" of this Court, and the Application may be brought by any party to the dispute being a party to the Protocol.

I will address jurisdiction more fully after Mr. Legum has advised the Court of the relevant facts. For the moment, I simply wish to point out that Paraguay founds jurisdiction in this case on Article I of the Optional Protocol.

I turn now to Mr. Legum.

ARGUMENT OF MR. LEGUM

COUNSEL FOR THE GOVERNMENT OF PARAGUAY

Mr. LEGUM: Mr. President, Mr. Vice-President and distinguished Members of the Court. I will this morning summarize the facts and proceedings in the United States concerning the case of Angel Francisco Breard.

Mr. Breard is a Paraguayan national. In 1986, at the age of 20, he left Paraguay to reside in the United States.

On 1 September 1992, Mr. Breard was arrested by law enforcement authorities of the Commonwealth of Virginia, one of the states of the United States. Mr. Breard was suspected to have raped and murdered a Virginia woman named Ruth Dickie.

Neither at the time Mr. Breard was arrested, nor at any point thereafter, did Virginia law enforcement authorities inform him of his right to receive consular assistance from the Paraguayan consulate. Nor did they ever advise the Paraguayan consulate of his detention. Neither the Virginia authorities nor the United States contend otherwise.

The Virginia authorities did not provide Paraguay the opportunity to consult with Mr. Breard and arrange for appropriate legal representation. Instead, the Virginia court itself appointed counsel for Mr. Breard. The lawyers appointed by the court were familiar with the Virginia criminal justice system. They had no familiarity, however, with the justice system or culture of Paraguay and were not equipped to address misconceptions concerning the functioning of the American justice system that a Paraguayan national might be expected to have.

Virginia brought Mr. Breard to trial and determined to seek the death penalty.

As a result of the lack of consular assistance, Mr. Breard made a number of objectively unreasonable decisions during the course of the criminal proceedings against him.

Perhaps most important, he rejected a plea offer that the Virginia authorities made before trial. The Virginia authorities offered to recommend a sentence of life imprisonment if Mr. Breard would plead guilty to the charges against him. Against the advice of his court-appointed attorneys, Mr. Breard rejected that offer.

Instead, Mr. Breard waived his right not to incriminate himself, took the witness stand and confessed to the murder. These actions ruled out any possibility that Mr. Breard would receive an acquittal and subjected him to one of three possible penalties under Virginia law: life imprisonment, life imprisonment with a $100,000 fine against him or the death penalty.

Therefore, in rejecting the plea offer and confessing at trial, Mr. Breard exposed himself to the risk of a death sentence without any possibility of receiving a lighter sentence than what the Virginia authorities had offered to him in the plea offer before trial.

Mr. Breard's decision to confess and reject the plea offer was based on a misunderstanding of the United States justice system and how it differed from the Paraguayan justice system. Where a confession at trial might appeal to the mercy of a Paraguayan court, such a confession in the Virginia trial served only to seal Mr. Breard's fate.

Paraguayan consular officers are familiar with the characteristics of both justice systems, understand the misconceptions of Paraguayan nationals about the United States justice system, and are skilled in explaining the differences in terms that Paraguayan nationals can understand. Had a Paraguayan consular officer been permitted to assist Mr. Breard, the officer would have provided Mr. Breard with information that would have enabled him to make more informed decisions in the conduct of his defence.

Even with Mr. Breard's confession at trial, the jury found it a close question whether to apply the death penalty. The jury transmitted a note to the trial judge enquiring whether it could sentence Mr. Breard to life in prison and at the same time recommend that he not be released on parole. Because such a sentence was not provided for under Virginia law at the time, the judge did not respond to the note.

At the conclusion of the 1993 trial, the jury found Mr. Breard guilty of the murder, and he was sentenced to death. Had he had the assistance of Paraguayan consular officers, that result would have been different, at least with respect to the sentence.

Mr. Breard appealed his conviction and sentence to Virginia's appellate courts. His appeals were denied. He also petitioned the state courts of Virginia for relief from his detention by way of a writ of *habeas corpus*. That petition was also denied.

In sum, Mr. Breard was detained, tried, convicted, and sentenced to death and had exhausted all of the remedies available to him in the state courts of Virginia without ever receiving the notification and consular assistance to which he was entitled under Article 36 of the Vienna Convention.

In the spring of 1996, without benefit of information from the authorities of Virginia or the United States, Paraguay finally learned that Mr. Breard was imprisoned in Virginia and awaiting execution. Paraguayan and consular officers immediately began rendering assistance to Mr. Breard.

At the time Paraguay first contacted Mr. Breard, he was entirely unaware of his rights under the Vienna Convention. He was unaware of those rights precisely because the authorities of the United States had failed to comply with their obligation to notify him of his rights under the Vienna Convention.

In late August 1996, Mr. Breard took the final step available to him for challenging his conviction and sentence: filing a petition for a writ of *habeas corpus* in a federal court of first instance. For the first time, Mr. Breard raised violations of the Vienna Convention.

In November 1996, the federal court of first instance denied Mr. Breard's petition for *habeas corpus*. The court held that under the municipal law doctrine of procedural default Mr. Breard could not assert the violations of the Vienna Convention as a basis of relief in the federal *habeas* proceedings because he had not done so in his prior legal proceedings.

The court held the doctrine to bar his Vienna Convention claims even though he had failed to raise those claims not through any choice on his part, but rather because the Virginia authorities had failed to notify him of his rights as required by the Convention.

The intermediate federal appellate court affirmed the lower court's decision on 22 January 1998. This affirmance exhausted all of the municipal law remedies available to Mr. Breard as a matter of right.

In light of the exhaustion of such remedies, by order dated 25 February 1998 the Virginia court that had sentenced Mr. Breard set an execution date of 14 April 1998.

Mr. Breard is scheduled to be moved on Friday, 10 April 1998, from the maximum security prison where he is currently incarcerated to the facility in another town of Virginia where the execution chamber is housed. Absent intervention, at 9 p.m. one week from today Virginia will, in the words of the authorizing statute, "cause the prisoner under sentence of death to be electrocuted or injected with a lethal substance until he is dead" (*Va. Stat. Ann.* § 53.1-234).

Mr. Breard has now petitioned the United States Supreme Court for a writ of *certiorari* and requested a stay of his execution.

Several aspects of the procedure in the Supreme Court are important to understand.

First, review in the Supreme Court is not a matter of right, but is a matter of discretion rarely exercised. Less than five per cent of all petitions for *certiorari* are granted. The situation is no different in cases involving the death penalty: prisoners facing execution routinely petition the Court and request a stay, and the Court routinely denies.

Second, in cases involving an imminent execution, the Supreme Court typically does not rule on the petition and request for a stay of execution until shortly before the scheduled execution. Often the decision is communicated telephonically to the petitioner a few hours before the execution.

I now turn to Mr. Donovan to set forth Paraguay's request for provisional measures.

ARGUMENT OF MR. DONOVAN

COUNSEL FOR THE GOVERNMENT OF PARAGUAY

Mr. DONOVAN : Paraguay asks this Court to direct the United States to ensure that Mr. Breard is not executed until the Court has had the opportunity to rule on Paraguay's claims under the Vienna Convention as presented in its Application instituting proceedings. In Paraguay's view, the impending execution of Mr. Breard on the basis of a criminal proceeding that it is acknowledged by the competent authorities of the United States did not comply with the requirements of the Vienna Convention establishes the need for provisional measures in this case with unusual clarity.

I will set forth Paraguay's request in four steps. First, I will demonstrate the Court's jurisdiction. Second, I will discuss the relationship of the provisional measures sought to the rights Paraguay seeks to vindicate in this matter in order to show that the measures sought are the minimum necessary to preserve the possibility of an effective final judgment. Third, I will describe the circumstances that establish the urgency of the request. Finally, I will set forth the basis of Paraguay's claim that it faces irreversible damage.

First, the matter Paraguay brings to this Court is plainly a "dispute arising out of the interpretation or application of the Convention". As Mr. Legum explained, neither the United States nor the competent authorities of the Commonwealth of Virginia have ever suggested that Virginia officials complied with Article 36 of the Vienna Convention when they prosecuted Mr. Breard for capital murder. Paraguay has sought relief for the violation from the United States for the past 18 months, both through diplomatic channels and — although it was under no obligation to do so — through the municipal court system in the United States.

The United States, however, has taken no steps to remedy the violation. In particular, the United States has taken no steps to halt the impending execution of Paraguay's national on the basis of a conviction and sentence obtained in violation of the Convention. As a result, the Parties have a dispute within Article I of the Optional Protocol, and the Court is competent to hear Paraguay's Application.

The Court's authority to go forward on this request for provisional measures becomes even clearer when one takes into account the principle, which this Court has stated on numerous occasions, that on a request for provisional measures, the Court need not finally satisfy itself of its jurisdiction, but may — given the very nature of provisional measures — proceed on the basis of a prima facie showing. Paraguay respectfully submits that the existence prima facie of jurisdiction under Article I is clear.

Second, the provisional measures Paraguay seeks are appropriate in light of its claims. Specifically, the measures Paraguay seeks are both *conservatory* and *conservative*.

This Court has often stated that the objective of provisional measures must be to "preserve the respective rights of the parties pending the decision of the Court" (*Nuclear Tests (New Zealand* v. *France), Interim Measures, I.C.J. Reports 1973*, p. 135 (Order of 22 June); *Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland), Interim Measures, I.C.J. Reports 1972*, p. 30 (Order of 17 August)). Here, Paraguay claims a violation of Article 36 of the Vienna Convention. Paraguay claims that it suffered injury from that violation in the form of a conviction rendered against, and sentence of death imposed upon, its national.

To remedy the violation, Paraguay seeks restitution in kind and an order of non-repetition.

As to restitution, in the classic formulation of the *Chorzów* Court, the author of an internationally wrongful act has an obligation "as far as possible, [to] wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed" (*Factory at Chorzów*, Judgment (Indemnity), *1928, P.C.I.J., Series A, No. 17*, p. 4, at p. 47 (13 September)). Article 43 of the International Law Commission's draft articles on State responsibility is to similar effect. In the ILC formulation, the injured State is entitled to "the re-establishment of the situation which existed before the wrongful act was committed" (Report of the International Law Commission, UN, *GAOR*, 51st Sess., Supp. No. 10, Art. 43, UN doc. A/51/10/1996 (Draft Articles on State Responsibility)).

In this case, the re-establishment of the prior situation will require an order against the enforcement of the conviction and sentence. It may also require, for example, an order directing that the plea offer that would have permitted Mr. Breard to avoid the death sentence be reconveyed. Obviously, no such orders could have any effect if Virginia has executed Mr. Breard in the meantime.

Likewise, as to non-repetition, Paraguay will seek an order requiring the United States to ensure compliance with the Vienna Convention should Virginia choose to retry Mr. Breard, as Paraguay expects it would. That order, too, would be useless if Mr. Breard has been executed.

Clearly, then, an order directing the United States to ensure that Mr. Breard is not executed during the pendency of this proceeding is necessary to preserve Paraguay's rights in the controversy.

The Court has also stated that provisional measures should not "anticipate" the Court's judgment on the merits. (See, e.g., *United States Diplomatic and Consular Staff in Tehran, Provisional Measures, I.C.J. Reports 1979*, p. 19, para. 28 (Order of 15 December); see also, e.g., *Factory at Chorzów, Interim Protection, 1927, P.C.I.J., Series A, No. 12*, p. 9, at p. 10 (Order of 21 November).) As an initial matter, I should note that the relief that Paraguay seeks on the merits in this case is carefully restrained. Paraguay does not contend that Mr. Breard is not subject to re-trial or to future prosecution for the acts with which he was charged. The fundamental contention of Paraguay is that in any such re-trial Paraguay's rights and Mr. Breard's rights under the Vienna Convention must be respected. Likewise, the provisional measures that Paraguay seeks are carefully limited and in no way anticipate a judgment. Paraguay does not ask, for example, that Mr. Breard be afforded a new trial at this time, or that his conviction and sentence be in any way affected except that the death sentence — the execution — be provisionally suspended. Mr. Breard will remain in custody, and if the United States prevails on the merits in this case, Virginia will be able to go forward with the execution. Thus, the United States can complain of no harm if the Court orders the narrowly tailored provisional measures that Paraguay seeks.

Third, the Court has also said that provisional measures should issue only in situations of urgency. (E.g., *Land and Maritime Boundary between Cameroon and Nigeria, Provisional Measures, I.C.J. Reports 1996*, p. 13, para. 35 (Order of 15 March). There can be no question of urgency here. As Mr. Legum has explained, neither Paraguay nor this Court can act on the assumption that the Supreme Court will grant a writ of *certiorari* or stay of the execution in Mr. Breard's case. As we have explained, Paraguay, too, has sought relief in the municipal courts of the United States. At the moment, Paraguay, too, in its own right and asserting only its own rights, has a petition for *certiorari* pending before the United States Supreme Court, and accompanying that petition it has filed an application for a stay of or injunction against the execution. But the same situation that Mr. Legum explained with respect to Mr. Breard's own petition obtains with respect to Paraguay's petition. We believe that the petition is compelling, but we must recognize that the Supreme Court grants very few petitions, and there is no possible way to predict in the case of any individual petition whether or not it will do so.

The nature of the provisional measures that are necessary here, considered in light of the constitutional structure of the United States, adds an additional element of urgency. The order of execution is an order of a state court, that of the Commonwealth of Virginia. While the United States plainly has the ability to comply with any order the Court may issue by obtaining a stay of the Virginia court's order of execution, it will need to intervene with state authorities in order to do so, and it may, if it is so advised, choose to call upon a federal court. In other words, unlike some other situations, if the Court indicates provisional measures forbidding the execution, the federal executive branch to which any order would first be communicated will need to act affirmatively in order to bring the United States in compliance with that indication of provisional measures. It will not be sufficient for the United States, at least in the form of its federal executive branch, simply to refrain from taking certain action. For that reason there is an additional need, with the greatest respect, for the Court to act quickly.

Finally, this Court has stated that the authority to grant provisional measures "presupposes that irreparable prejudice should not be caused to rights which are the subject of dispute in judicial proceedings". (E.g., *Aegean Sea Continental Shelf* (*Greece* v. *Turkey*), *Interim Protection, I.C.J. Reports 1976*, p. 3 (Order of 11 September); *Nuclear Tests* (*New Zealand* v. *France*), *Interim Protection, I.C.J. Reports 1973*, p. 135; *Fisheries Jurisdiction* (*Federal Republic of Germany* v. *Iceland*), *Interim Protection, I.C.J. Reports 1972*, p. 30.) In other words, the Court has required a showing of irreparable injury or irreversible damage in some sense as a predicate to an indication of provisional measures. In Paraguay's view, I need not dwell on this requirement here. Needless to say, death is irreparable, irreversible and, in a very fundamental sense, irremediable. In considering requests from death-row prisoners for stays of their execution, the United States Supreme Court accepts, without reservation, that in cases involving an execution, the equitable requirement of irreparable injury in seeking the equitable intervention of a stay or injunction is a given. (Robert L. Stein *et al.*, *Supreme Court Practice* 698 (7th ed., 1993); e.g. *Wainwright* v. *Booker*, 473 US 935, 935 n. 1 (1985) (Powell, J., concurring).) Now that a death-penalty case has reached this Court, it should be no different here.

The crimes with which Mr. Breard is charged deserve unequivocal condemnation. On the present state of affairs, individual states of the United States have the authority to express that condemnation in the form of the penalty of death. But even if the death penalty may still be lawfully imposed as a matter of sanction, courts entrusted to uphold the rule of law — on the international level no less than on the municipal level — must be vigilant to ensure the lawfulness, too, of the proceedings by which that penalty is imposed. To exercise that vigilance here, the Court must first indicate to the United States that it must ensure that Paraguay's national is not executed while this case is before the Court.

Dr. Gorostiaga will conclude Paraguay's submissions.

STATEMENT BY MR. GOROSTIAGA

COUNSEL FOR THE GOVERNMENT OF PARAGUAY

Mr. GOROSTIAGA : Mr. Vice-President, Mr. President, and distinguished Members of the Court.

My colleagues have explained the importance of consular assistance in general. I wish very briefly to highlight the importance of consular assistance in this case in particular.

The United States is one of a relatively small group of countries that still impose the death penalty. Paraguay's Constitution, by contrast, expressly forbids the death penalty and guarantees the right to life.

The severity and irreversible nature of the death penalty greatly increase the importance of consular assistance in all cases in which it is sought. There is an enormous qualitative difference between a term of imprisonment and death : a case in which the death penalty is sought against a foreign national implicates to the maximum extent possible the foreign State's interest in protecting its nationals.

Such a case therefore brings into play in the most concrete and immediate way the sending State's right to provide consular assistance.

I wish to conclude by stating that Paraguay, of course, does not condone in any way the violent crime with which Mr. Breard was charged.

Further, Paraguay does not contest in any way the authority of the United States or its constituent entities to enforce its criminal laws with respect to this or any other crime committed within its jurisdiction.

Paraguay does contend, however, that the competent authorities of the United States must enforce its criminal laws by means that comport with the obligations undertaken by the United States in the Vienna Convention.

That was not done in the case of Angel Breard.

Paraguay today requests that this Court indicate provisional measures to ensure that the possibility will remain for Paraguay to exercise its rights under that Convention in Mr. Breard's case.

The VICE-PRESIDENT : The Court will now adjourn for ten minutes and resume again to hear the submissions of the United States.

The Court adjourned from 11.00 a.m. to 11.15 a.m.

STATEMENT BY MR. ANDREWS

AGENT FOR THE GOVERNMENT OF THE UNITED STATES OF AMERICA

The VICE-PRESIDENT : The Court now resumes its sitting to hear the submissions of the United States of America.

Mr. ANDREWS : Mr. President, Members of the Court. Before I begin my presentation I would like to express the pleasure of the United States delegation at seeing Judge Kooijmans again sitting with the Court.

1.1. Mr. President, it is again an honour to appear before the Court, although I regret that it must be in a matter so hurried and involving facts so unhappy as those involved here.

1.2. As the Court well knows, Paraguay filed this case four days ago. Because of Paraguay's decision to file at such a late date, the Court decided to hold a hearing today on Paraguay's request for provisional measures. Out of our respect for the Court, we have of course come here urgently to participate in these proceedings. This morning, we will present our reasons why the Court should not indicate provisional measures. Given the extraordinary haste of these proceedings, however, our presentations will be less fully developed than we would like. We regret the unfortunate circumstances that have led to this expedited proceeding, which prejudices not just the United States, but the ability of the Court to consider the issues before it fully and fairly. We likewise regret the fact that Paraguay has chosen to disregard the two-month period provided in the Optional Protocol to the Vienna Convention for the possible resolution of such disputes through conciliation or arbitration.

1.3. The facts of the criminal indictment underlying this case are straightforward ; indeed, we should all be clear that Mr. Breard unquestionably committed the offences for which he was tried. On 17 February 1992, Mr. Breard attempted to rape and then brutally murdered Ruth Dickie, a woman in Arlington, Virginia, a suburban jurisdiction across the Potomac River from Washington D.C. He was then arrested while attempting another rape. As we shall explain, genetic and other physical evidence linked Mr. Breard to the murder and the attempted rape. Indeed, ample evidence independent of his own testimony existed to prove that Mr. Breard committed these crimes. Mr. Breard was also implicated in a third sexual assault committed before he murdered Ms Dickie.

1.4. The Arlington police took Mr. Breard into custody and charged him with serious offences. The Commonwealth of Virginia has stipulated in United States court proceedings that the "competent authorities" did not inform Breard that, as a national of Paraguay, he was entitled to have Paraguay's consul notified of his arrest. Under Article 36 of the Vienna Convention on Consular Relations, the police were obliged to tell Mr. Breard that the consul could be so notified.

1.5. Mr. Breard had lived in the United States since 1986 and speaks English well, he was appointed experienced criminal defence counsel, and was able to maintain close and regular contact with friends and family. Given the circumstances and gravity of his crime, the jury recommended that he be sentenced to death, and the judge did so. Thereafter, Mr. Breard's attorneys brought a number of further actions in Virginia state courts and in United States courts seeking reversal of his conviction and sentence. This process has continued for almost five years, involving actions in different courts in the United States, including the United States Supreme Court, where Breard's request for *certiorari* — in other words, discretionary review by the Supreme court — is still pending today.

1.6. As this Court knows, the indication of provisional measures is a serious matter which the Court is cautious in exercising. That is especially true in this case, where the Court is being asked to take action that would severely intrude upon the national criminal jurisdiction of a State in a matter of violent crime. Under the Court's jurisprudence, an applicant may only obtain the indication of provisional measures of protection in narrowly defined circumstances, which the United States submits do not exist here.

1.7. The United States principal submission to the Court is that Paraguay has no legal recognizable claim to the relief it seeks and, for that reason, there is no prima facie basis for jurisdiction for the Court in this case, nor any prospect for Paraguay ultimately to prevail on the merits. Consequently, and in accordance with its jurisprudence, this Court should not indicate provisional measures of protection as requested by Paraguay.

1.8. Paraguay has no legally recognizable claim because Paraguay has no right under the Vienna Convention to have Mr. Breard's conviction and sentence voided. Paraguay in effect asks that this Court grant Mr. Breard a new trial — a right which would then presumably accrue to any other person similarly situated in the United States or in any other State which is a party to the Vienna Convention. The United States will show in these proceedings that this is not the consequence of a lack of notification under the Vienna Convention. The Court should not accept Paraguay's invitation to rewrite the Convention and to become a supreme court of criminal appeals.

1.9. Before describing the manner in which the United States will proceed in its presentation, I feel obliged to make a few comments about the issue of the death penalty in the United States. In a majority of the states of the United States (38), including Virginia, voters have chosen through their freely elected officials to retain the death penalty for exceptionally grievous offences. Likewise, the United States itself authorizes the death penalty for exceptionally grievous federal offences. In practice, it is imposed, almost without exception, only for aggravated murder, as was the case here. In all cases, the death penalty may be carried out only under substantive laws in effect at the time the crime was committed. All convictions and sentences involving the death penalty are subject to the extensive due process and equal protection requirements of the United States Constitution. They are also subject to exhaustive appeals at the state and federal levels, as has been the case with Mr. Breard.

1.10. When carried out in accordance with these safeguards, the death penalty does not violate international law. Capital punishment is not prohibited by customary international law or by any treaty to which the United States is a party. We recognize that some countries have abolished the death penalty under their domestic laws and that some have accepted treaty obligations to that effect. We respect their decisions. However, we also believe that in democratic societies, the criminal justice system, including the punishments prescribed for the most serious crimes, should reflect the will of the people freely expressed and appropriately implemented by their elected representatives. Within the United States, legislative majorities nationally and in most of the constituent states have chosen to retain the option of capital punishment for the most serious crimes.

1.11. Many other countries likewise maintain capital punishment. On the same day that Paraguay filed this case, 3 April, the Commission on Human

Rights in Geneva adopted a resolution that encouraged States that have the death penalty to establish a moratorium on executions. This resolution passed, but by a sharply divided vote of 26 in favour and 13 against, with 12 abstaining. This action reflects the diversity of views held in the international community concerning capital punishment.

1.12. Capital punishment is not the issue in the dispute between the United States and Paraguay. The actual issues are quite different. They are very narrow. They relate to the Vienna Convention on Consular Relations, to which both the United States and Paraguay are parties.

1.13. As is customary, Mr. President, the United States will not read the full citations that support our arguments, but they are included in the texts provided to the Court and to opposing counsel. Further, I wish to note that the United States reserves the right to make additional arguments regarding issues of jurisdiction or the merits of this case that are not made today for purposes of this proceeding. Our presentation will proceed as follows. Ms Catherine Brown, the Department of State's Assistant Legal Adviser for Consular Affairs, will discuss the nature of the consular function and the practice of States with regard to consular notification and the remedies when notification is not provided. She will also describe in some detail the underlying facts of Mr. Breard's case and the efforts of the United States once it became aware of the case.

1.14. Ms Brown will be followed by Mr. John Crook, the State Department's Assistant Legal Adviser for United Nations Affairs. Mr. Crook will discuss the legal factors that should guide the Court in determining whether it should indicate provisional measures and will apply those factors to this case to show that provisional measures are not warranted. In doing so, he will discuss the text of the Vienna Convention, its negotiating history, and relevant subsequent practice.

1.15. Mr. Matheson, the State Department's Principal Deputy Legal Adviser and Co-Agent in this case, will address additional, prudential reasons for the Court not to issue provisional measures in this case, by noting the problems that would be created were the Court to assume the role asked by Paraguay.

1.16. After Mr. Matheson's presentation, I will return to the podium to provide a brief closing. I ask you now to invite Ms Brown to the podium.

ARGUMENT OF MS BROWN

COUNSEL FOR THE GOVERNMENT OF THE UNITED STATES OF AMERICA

Ms BROWN : Mr. President, Members of the Court.

2.1. It is a privilege and honour to be appearing before this Court for the first time.

2.2. My task is to explain to the Court the factual background of this dispute. I will review how the United States has responded to the concerns expressed by the Government of Paraguay, including the results of our investigation into the facts of Mr. Breard's case. First, however, I will address the nature of the consular function and the practice of States with regard to consular notification, in so far as those facts are relevant to the issues of this case.

I. THE CONSULAR FUNCTION

2.3. The principal function of consular officers is to provide services and assistance to their country's nationals abroad. The Vienna Convention on Consular Relations, to which both the United States and Paraguay are parties, enumerates a wide range of general consular functions in Article 5. Article 36 addresses the specific issue of consular officers communicating with their nationals abroad.

2.4. Article 36, paragraph 1 *(a)*, provides that consular officials shall be free to communicate with their nationals and to have access to them. This case does not involve a deliberate interference with Paraguay's right to communicate with its national, Angel Breard. Moreover, since Paraguayan consular officials became aware of Mr. Breard's detention, they have been able to communicate and visit with him.

2.5. Article 36, paragraph 1 *(b)*, provides that a detained foreign national shall be permitted without delay to communicate with the relevant consular post and that competent authorities will advise the consular post of the foreign national's detention without delay if the detainee so requests. There is no serious question in this case that Mr. Breard could at any time have communicated with a Paraguayan consular official, either directly or through his family or his attorneys, had he known and chosen to do so.

2.6. Article 36, paragraph 1 *(b)*, concludes with the "consular notification" obligation that is at issue in this case : it provides that "the said authorities shall inform the person concerned without delay of his rights under this paragraph". Virginia authorities apparently did not so advise Mr. Breard, at the time of his arrest, or at any time prior to his conviction and sentence, that he could communicate with a consular official. But that does not mean that he was impeded or dissuaded from obtaining consular assistance. He, or his family, or his attorneys, might at any time have enlisted the assistance of a consul, as is frequently the case. The option of calling one's embassy or consul for help is widely known, and many Governments advise their own nationals to call their embassy or consul in an emergency abroad.

2.7. Article 36, paragraph 1 *(c)*, provides that consular officials may visit their nationals in detention, converse and correspond with them, and arrange for their legal representation. Again, there was no deliberate effort to interfere with this right, and since becoming aware of Mr. Breard's detention Paraguayan consular officials have been able to visit and communicate with him. With respect to legal representation, arrangements were made by the State of Virginia for two clearly competent lawyers to represent Mr. Breard. Thus a consul proved unnecessary to perform this function.

2.8. Finally, Article 36, paragraph 1 *(c)*, concludes that a consular officer shall refrain from taking action on behalf of a national who is in prison if he expressly opposes such action. This provision is of particular interest here because Mr. Breard did not accept — indeed he adamantly resisted and even rejected — the advice not only of his attorneys, but also of his mother, a Paraguayan national.

2.9. Several additional points are noteworthy. First, neither Article 5 nor Article 36 imposes any obligations on consular officers themselves. A consular officer may or may not choose to undertake any particular function on behalf of his countrymen. Consequently, the practice of States — and even of individual consuls — in assisting their nationals varies widely. Some countries are very active, while others are passive or even quite frankly uninterested or unable to provide any significant consular assistance. A country may have just one or two consular officials in a capital city, and none at a more remote location. A country's consular officials may make frequent prison visits or visit only selectively, if at all. Each country decides for itself what it will do. This in turn creates expectations among its nationals as to whether seeking consular assistance would be worthwhile.

2.10. Second, nothing in these Articles elevates the rights of foreign nationals above those of citizens of the host country. A foreign national is expected to obey the host country's laws, and is subject to its criminal justice system. Consular officers assist their nationals within this context. Consistent with this, Article 5 *(i)* of the Vienna Convention limits the rights of consular officers to represent or to arrange representation of their nationals before the tribunals of the receiving State. They may do so only "subject to the practices and procedures obtaining in the receiving State". The United States does not permit foreign consular officials to act as attorneys in the United States, nor may its own consular officers abroad act as attorneys for American citizens. We believe that this is the general practice of States.

2.11. Third, the Vienna Convention does not make consular assistance an essential element of the host country's criminal justice system. This is inevitable, given that consular officers have no obligations to act in any particular way vis-à-vis a host country's criminal justice system. A consul may do nothing at all, leaving the justice system to run its course. Or, the consul may visit the detainee ; may ensure that the detainee's family is aware of the detention ; may assist the detainee in securing counsel, if necessary ; and may follow developments so that any questions about the fairness of the proceedings can, if appropriate, be discussed with host country officials. But the consular officer is not responsible for the defence because he cannot act as an attorney.

II. State Practice with Respect to Consular Notification

2.12. Two additional aspects of State practice are relevant : how faithfully do Governments provide notification and what remedies, if any, are provided by Governments for failures to notify ? Because it is important that the United States respond appropriately to allegations of violations of consular notification, the Department of State recently made enquiries to all of our embassies and, through them, directly to Governments on these matters. While our information remains incomplete, we believe that it fairly reflects the range of State practice.

2.13. Practice with respect to notification: Compliance with respect to the obligation to notify the detainee of the right to see a consul in fact varies widely. At one end of the spectrum, some countries seem to comply unfailingly. At the other end, a small number seem not to comply at all. Rates of compliance seem partly to be a function of such factors as whether a country is large or small, whether it has a unitary or federal organization, the sophistication of its internal communications systems, and the way in which the country has chosen to implement the obligation. Countries have chosen to implement the obligation in different ways, including by providing only oral guidance, by issuing internal directives and by enacting implementing legislation. Some apparently provide no guidance at all.

2.14. If a detainee requests consular notification or communication, actual notification to a consul may take some time. It may be provided by telephone, but sometimes a letter or a diplomatic note is sent. As a result, there may be a significant delay before notification is received and, consequently, critical events in a criminal proceeding may have already occurred before a consul is aware of the detention. And, as noted previously, the consul may then respond in a variety of ways. For these reasons, and because of the wide variation in compliance with the consular notification requirement, it is quite likely that few, if any, States would have agreed to Article 36 if they had understood that a failure to comply with consular notification would require undoing the results of their criminal justice systems.

2.15. Practice with respect to remedies: Let me turn now to what our enquiries revealed about State practice with respect to remedies. Typically when a consular officer learns of a failure of notification, a diplomatic communication is sent protesting the failure. While such correspondence sometimes goes unanswered, more often it is investigated either by the foreign ministry or the involved law enforcement officials. If it is learned that notification in fact was not given, it is common practice for the host Government to apologize and to undertake to ensure improved future compliance. We are not aware of any practice of attempting to ascertain whether the failure of notification prejudiced the foreign national in criminal proceedings. This lack of practice is consistent with the fact and common international understanding that consular assistance is not essential to the criminal proceeding against a foreign national.

2.16. Notwithstanding this practice, Paraguay asks that the entire judicial process of the State of Virginia — Mr. Breard's trial, his sentence, and all of the subsequent appeals, which I will review momentarily — be set aside and that he be restored to the position he was in at the time of his arrest because of the failure of notification. Roughly 165 States are parties to the Vienna Convention. Paraguay has not identified *one* that provides such a *status quo ante* remedy of vacating a criminal conviction for a failure of consular notification. Neither has Paraguay identified any country that has an established judicial remedy whereby a foreign Government can seek to undo a conviction in its domestic courts based on a failure of notification.

2.17. In the United States today, foreign nationals and the Government of Paraguay are attempting to have our courts recognize such a remedy as a matter of United States domestic law. But if our courts do so, the United States will become, as far as we are aware, the first country in the world to permit such a result. A number of foreign ministries have advised us that this result would certainly or most likely not be possible in their countries.

2.18. It is not difficult to imagine why such remedies do not exist. As noted, consular assistance, unlike legal assistance, is not regarded as a predicate to a criminal proceeding. Moreover, if a failure to advise a detainee of the right of consular notification *automatically* required undoing a criminal procedure, the result would be absurd. In particular, it would be inconsistent with the wide variation that exists in the level of consular services provided by different countries. But it would be equally problematic to have a rule that a failure of consular notification required a return to the *status quo ante* only if notification would have led to a different outcome. It would be unworkable for a court to attempt to determine reliably what a consular officer would have done and whether it would have made a difference. Doing so would require access to normally inviolable consular archives and testimony from consular officials notwithstanding their usual privileges and immunities. In this case, for example, one might wish to examine Paraguay's consular instructions and practices as of the time when Mr. Breard was arrested and enquire into the resources then available to Paraguay's consular officers. Surely Governments did not intend that such questions become a matter of enquiry in the courts.

III. THE UNITED STATES RESPONSE TO THE FAILURE OF NOTIFICATION

2.19. Against this background, I would now like to advise the Court of the steps taken by the United States relating to this case in an effort to be responsive to Paraguay's concerns.

2.20. The United States received official notice of Mr. Breard's case in April 1996 through a diplomatic note from Paraguay's Embassy in Washington. Significantly, the note did not allege a breach of the Article 36 consular notification obligation. It did not request consultations to discuss the case. It did not ask for any United States government intervention other than to facilitate efforts to obtain information from Virginia, which the Department of State did. The Department later learned, from Mr. Breard's attorneys, that those attorneys were attempting to challenge Mr. Breard's conviction based on an apparent failure of consular notification and litigation brought by Mr. Breard.

2.21. In September 1996, Paraguay filed suit against Virginia in a federal trial court. The suit sought to restore the *status quo ante* for Mr. Breard on the theory that only such action could vindicate Paraguay's governmental rights in consular notification.

The Department of State discussed the case with representatives of Paraguay in October 1996 and later received a request from the Paraguayan Ambassador for assistance in obtaining a new trial for Mr. Breard. That request failed to provide any evidence that consular law or practice would require such a result. Nevertheless, United States officials met with counsel for Paraguay about the matter and gave the issues raised by the suit careful consideration. Ultimately, the United States concluded that Paraguay's remedy for the consular notification failure lay in diplomatic communications with the Department of State. The United States so advised both the court in which Paraguay's case was pending and Paraguay's Ambassador. The United States did not object to Mr. Breard's own efforts to raise the consular notification issues in the courts, but neither did it support them.

2.22. On 3 June 1997, the Department received another letter from the Ambassador. I note that this letter is not referenced in Paraguay's Application to this Court. In it the Ambassador advised that Paraguay thought that the dispute should be resolved in the domestic courts of the United States, and not by this Court, but that Paraguay nevertheless would agree with the United States to come to this Court. This proposal was conditioned: the domestic United States proceedings should be stayed; the United States should waive any jurisdictional objections it might have to the jurisdiction of this Court; and the United States should agree to require Virginia to accept this Court's decision. Like Paraguay's previous correspondence, this letter again failed to offer any serious explanation of why the remedy Paraguay was seeking was appropriate.

2.23. The Department of State nevertheless then decided to undertake an investigation into the case. In our investigation, we received the full co-operation of Virginia and we reviewed all facts relevant to the consular notification issue. This included the critical portions of the transcript, including Mr. Breard's testimony and an affidavit from his defence lawyers concerning their efforts on his behalf.

2.24. Through this process, we learned the following relevant facts:

(1) Mr. Breard unquestionably committed the offences for which he was tried. He was arrested while attempting a rape. Genetic and other physical evidence linked him to the earlier murder and attempted rape of Ruth Dickie. Ample evidence existed to prove that Mr. Breard committed these crimes, entirely independently of his own testimony. Indeed, nothing in Paraguay's submission suggests that Mr. Breard did not commit the crimes for which he was sentenced. Paraguay instead suggests that a consular officer might have persuaded Mr. Breard to make different tactical decisions;

(2) Mr. Breard had almost immediate and thereafter continuing contact with his family. He testified that one of the first phone calls he made at the time of his arrest was to his uncle. His mother and a cousin were involved in his defence, and his mother testified at his trial. Contacting family members is normally one of the first and most important things that a consular officer does when a national is detained, but here consular assistance to accomplish this proved unnecessary;

(3) Mr. Breard first came to the United States in 1986 and thus had been resident in the United States for about six years at the time of his arrest. He had been married briefly to an American. This made it difficult to accept Paraguay's contention that Mr. Breard did not understand American culture;

(4) Mr. Breard had a good command of English. His lawyers had no difficulty communicating with him in English. He testified at his trial in English and the transcript of his testimony attests to his command of the language. Mr. Breard told the judge that he had no problems with English and was comfortable speaking it. Moreover, the state would have provided an interpreter had one been needed. Thus, Paraguay's implication that Mr. Breard was tried unfairly in a language he did not understand is demonstrably false. While a consular officer might help interpret for a detained foreign national, such assistance was not needed by Mr. Breard;

(5) Mr. Breard was represented by two criminal defence lawyers experienced in death penalty litigation. They spent at least 400 hours — the equivalent of 50 days — on his case. United States courts subsequently concluded that their legal representation met the requirements of the United States Constitution for the effective assistance of counsel. These attorneys worked closely with Mr. Breard, his mother, a female cousin and his religious counsellor from jail, who was of Bolivian origin, to prepare his

defence. They communicated with Mr. Breard[illegible] personal friends to find witnesses who could testify on his behalf. They communicated with persons in Paraguay to find evidence that would assist in his defence. They arranged for the court to appoint three experts to examine Mr. Breard's mental competence, and they obtained his medical records from Paraguay and from Argentina, so as to explore fully the possibility of an insanity defence and to develop mitigation evidence. Paraguay's assertion that it could have paid for witnesses from Paraguay appears irrelevant, because both his mother and cousin came from Paraguay to assist and there is no indication that there were other witnesses who were not used because of financial constraints ;

(6) Mr. Breard decided to plead "not guilty" and to testify in both the penalty and sentencing phases of his trial contrary to the advice of his legal counsel and his mother — a strategy that was clearly unwise. This is the principal tactical decision Paraguay asserts it could have changed, but it is clear that Mr. Breard was advised against it by his own lawyers and his mother, yet rejected their advice. He was fully apprised of the risks of his strategy in the context of the American legal system. Access to a consular officer, who would have been less familiar with that system than his own lawyers, would not have made Mr. Breard's tactical decisions more informed ;

(7) there is no credible evidence that Mr. Breard's decision to plead "not guilty" and testify was founded on a cultural misunderstanding. He was born and lived his early years in Argentina, he went to Paraguay for his secondary education, and then he came to the United States to study English. As noted, he had been in the United States for six years and married to an American briefly. Significantly, as noted, his mother was also Paraguayan and yet she as a Paraguayan understood the error of his judgment well enough to advise him not to do what he did. And again, finally, his lawyers unequivocally explained to him that his strategy would not work. He signed a statement confirming that he was rejecting their advice and was not afraid of the outcome even if it resulted in a sentence of death ;

(8) although Mr. Breard's legal counsel apparently thought that Breard had the opportunity to plead guilty in exchange for a life sentence, at best only very general preliminary discussions were held on this matter and they were never seriously pursued. Virginia officials have advised us that no actual offer of a plea agreement was ever made and that none would have been made, because of the strength of the government's case and the aggravated circumstances of the crime. Virginia would not affirmatively have agreed to a life sentence because under Virginia law a life sentence would have permitted Mr. Breard's future release. Thus Paraguay's assumption that Mr. Breard could have avoided the death penalty through a plea bargain does not withstand scrutiny ;

(9) objective evidence indicates that the jury and the judge could easily have decided on the death penalty even if Mr. Breard had not testified. There was evidence that the murder was "aggravated" within the meaning of Virginia law, both by the "vileness" of the particular circumstances surrounding it and by the continuing danger that Mr. Breard posed to the community. This evidence supported imposition of the death penalty under Virginia law and the judge, who had to approve the jury's recommendation, would have known that a life sentence meant the possibility of future release ;

(10) finally, Mr. Breard had the full protection of the criminal justice system. In addition to competent court-appointed counsel, he had full judicial review. His conviction and sentence were reviewed and sustained by the Virginia trial court and the Virginia Supreme Court, and subsequently by a federal district court and a federal appeals court. The consular notification issue was being raised only after these procedures had been completed, in yet two more entirely separate legal proceedings.

2.25. In July 1997, the Department reported the results of its investigation in a letter to the Ambassador. That letter also is not referred to in Paraguay's Application to this Court. Because it found no evidence of consular notification or access, the Department expressed deep regret that such notification apparently was not provided to Mr. Breard. The Department advised, however, that there was no basis for concluding that consular assistance would have altered the outcome. It further stated that it saw no appropriate role for this Court.

2.26. Significantly, the Government of Paraguay has never responded to that letter, either to contest its factual assumptions or to address the Department's conclusion that consular notification would not have made a difference. Even so, the United States has continued to have periodic communications and discussions about the case with Paraguay. These discussions included assurances given as recently as February of this year by senior Paraguayan government officials that they recognized that this case was unprecedented and unlikely to succeed. On 30 March, however, Paraguay unexpectedly advised the United States that it would file this suit unless the United States engaged in consultations and stayed Mr. Breard's execution. Still prepared to address in diplomatic channels any issues relating to consular notification, the United States agreed to engage in such consultations. The United States did so even though it was unable to stay the execution — which is in the hands of the United States Supreme Court and the Governor of Virginia — and even though it continues to believe that this Court is not an appropriate forum to address Paraguay's concerns.

2.27. In addition to these specific measures relating to Mr. Breard's case, the United States has also intensified its long-standing efforts to ensure that all federal, state, and local law enforcement officials in the United States are aware of and comply with the consular notification and access requirements of Article 36. Guidance on these requirements has been issued regularly by the Department of State for many years. Recently, however, the Department has issued new and comprehensive guidance on this subject, along with a pocket-sized reference card for law enforcement officers to carry on the street. These materials have been personally provided by the Secretary of State to the United States Attorney-General and to the Governor of every state of the United States including, of course, Virginia. They have also been provided by the Department's Legal Adviser, Mr. Andrews, to every state Attorney-General, and they are being disseminated throughout the United States. In addition, the Departments of State and Justice have begun conducting briefings on these issues for state and federal prosecutors, and law enforcement officials, focusing particularly on areas with high concentrations of foreign nationals. Through these and other efforts, the United States is both acting to correct the circumstances that led to the failure of consular notification in Mr. Breard's case and acting in a manner consistent with State practice. Nothing more is required.

2.28. Mr. President, that concludes my factual presentation of the consular issues raised by this case. I thank the Court for its attention and invite it now to call upon Mr. Crook to speak.

ARGUMENT OF MR. CROOK

COUNSEL FOR THE GOVERNMENT OF THE UNITED STATES OF AMERICA

Mr. CROOK : 3.1. Mr. President, Members of the Court, it is again an honour and a pleasure for me to appear before you. My presentation will consider several important legal factors that should guide the Court in determining whether to indicate provisional measures in this case. I will show why, for a number of reasons, the Court should not indicate the measures requested by Paraguay.

I. THE SIGNIFICANCE OF PROVISIONAL MEASURES

3.2. I must begin by underscoring the gravity and importance of the decision now before the Court. As the Court well understands, the indication of provisional measures is a matter of serious consequence. The decisions of this Court clearly show the need for caution before taking such action. This reflects, first of all, the impact on the authority and the responsibility of sovereign States that such measures may have. It also reflects the fact that such measures may be indicated only after hurried and incomplete proceedings, and that is particularly true here where the Court is sitting to hear a case that was filed less than 96 hours ago.

3.3. It is for such reasons that the Court and commentators have stressed the exceptional nature of the Court's provisional measures power. I refer the Court, for example, to its Order in the case concerning *Aegean Sea Continental Shelf, Interim Protection, Order of 11 September 1976* (*I.C.J. Reports 1976*, paras. 32 and 11), and, as Mr. Andrews indicated, the citations in all these matters are contained in the transcript we have handed to the Registry. Thoughtful opinions by individual Judges have examined the point in greater detail. I refer you to Judge Shahabuddeen's opinion in the case concerning *Passage through the Great Belt (Finland* v. *Denmark), Provisional Measures, Order of 29 July 1991* (*I.C.J. Reports 1991*, p. 29); Judge Lachs in the *Aegean Sea Continental Shelf, Interim Protection, Order of 11 September 1976* (*I.C.J. Reports 1976*, p. 20); the dissenting opinions of Judges Winiarski and Badawi Pasha in the case concerning the *Anglo-Iranian Oil Co., Interim Protection, Order of 5 July 1951* (*I.C.J. Reports 1951*, p. 97) where they observed that "[m]easures of this kind in international law are exceptional in character to an even greater extent than they are in municipal law ; they may easily be considered a scarcely tolerable interference in the affairs of a sovereign State". Judge Lachs, I think, well summed up the consequences in his separate opinion in the *Aegean Sea* case : "the Court must take a restrictive view of its powers in dealing with a request for interim measures".

3.4. The basic factors guiding the Court's decision whether or not to use its exceptional power to indicate provisional measures are laid down in the Statute of the Court. Article 41 envisions that the Court will carry out two separate, although inter-related, examinations. In the interests of time, I shall not read Article 41 but I would refer the Court to it, in particular Article 41 (1).

3.5. As the Court will see, that text envisions two separate lines of enquiry. First, the Court's decision whether to indicate provisional measures is to be guided by an assessment of the overall context or circumstances of the case before it. Second, any measures to be indicated are of a nature "which ought to be taken to preserve the respective rights of either party". I shall consider each of these aspects in turn.

II. PROVISIONAL MEASURES ARE NOT WARRANTED IN THESE CIRCUMSTANCES

3.6. I shall begin by showing how provisional measures are not warranted in these circumstances. Now Article 41 shows that the Court can and should consider the totality of circumstances involved in a case in deciding whether the indication of provisional measures is appropriate. Other members of the United States team are treating some particularly relevant circumstances. The Agent of the United States, Mr. Andrews, briefly addressed issues relating to the timing of this case. He noted the prejudice, both to the United States and to the judicial process, that follows from the Applicant's decision to file its case at the time it chose to do so. Ms Brown described the facts underlying Paraguay's claim, showing how it departs from the realities of international consular practice. She also showed how the failure to inform Mr. Breard of his right to consular access had no bearing on his trial, conviction and sentence. In our next presentation, Mr. Matheson will analyse yet other relevant circumstances, particularly the implications of this case for other States and for the Court.

3.7. My own discussion will be focused on two interrelated aspects of Paraguay's legal claim. First, I will show how the Court does not have jurisdiction to provide the remedy that Paraguay seeks in its Application. Then I will show how, in assessing whether to indicate provisional measures which may substantially prejudice the party against which they are directed, the Court must weigh the nature of the legal claims before it. The Court should not exercise its exceptional power to indicate provisional measures that prejudice the target State, where the moving Party's claims are legally unfounded or are unlikely to prevail.

3.8. Now as I shall show, particularly given the drastic consequences of Paraguay's basic legal claim — that the lack of consular notification invalidates each and every subsequent conviction of any alien in any State party to the Vienna Convention on Consular Relations — that claim should not prevail. Neither the Convention's language, nor its history, nor State practice supports it.

No Jurisdiction

3.9. Because of the fundamental flaws that undermine Paraguay's claim for relief, the Court has no jurisdictional basis for the measures now requested. Now admittedly, the showing of jurisdiction at the stage of preliminary measures is less substantial than is required at later stages of the case. As the Court recently summarized in its Application of the Genocide Convention Order:

> "[O]n a request for provisional measures, the Court need not, before deciding whether or not to indicate them, finally satisfy itself that it has jurisdiction on the merits of the case, yet it ought not to indicate such measures unless the provisions invoked by the Applicant . . . appear, prima

> facie, to afford a basis on which jurisdiction of the Court might be established." (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993*, p. 11, para. 14.)

Although the burden of showing jurisdiction is lower now than it will be at later stages of this case, the Applicant still has a burden to meet. Paraguay has not met that burden.

3.10. Article I of the Optional Disputes Settlement Protocol to the Vienna Convention on Consular Relations gives the Court jurisdiction over disputes arising out of the "interpretation or application" of the Convention. However, there is no dispute here about either the interpretation or the application of the Convention. The Parties do not disagree on what it means to "inform" a foreign national of his rights under Article 36, paragraph 1 *(b)*, of the Convention. Nor do they dispute that Mr. Breard was not so informed.

3.11. Instead, Paraguay's claim in this case, in essence, is that under the Vienna Convention the Court can void Mr. Breard's criminal conviction and sentence, and require that he be given a new trial. As I will show, the Vienna Convention does not provide for such an extraordinary form of relief. Paraguay may object to the appropriateness of a criminal conviction and sentence under United States law and practice, but this is not a dispute about the interpretation or application of the Vienna Convention.

3.12. Paraguay tries to meet this difficulty by invoking the doctrine of *restitutio in integrum* (Paraguay's Application, p. 8, *supra*, para. 25). Paraguay cannot, however, create a right that does not otherwise exist under the Vienna Convention on Consular Relations — the Court's sole basis for jurisdiction in this case — simply by invoking a general principle of the law on reparation.

Paraguay has failed to make a prima facie showing that the Court has jurisdiction to grant the exceptional relief it seeks here. Under the circumstances, under the Court's well-settled jurisprudence, there is no jurisdictional basis for the Court to indicate provisional measures.

3.13. In this respect, this situation is similar to that faced by the Court in the provisional measures phase of the *Lockerbie* case (case concerning *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), Provisional Measures, Order of 14 April 1992*, Request for the Indication of Provisional Measures, para. 43). There, the Court found, as a prima facie matter, that there was no legal basis for the Libyan claim under the Montreal Convention because of the adoption of a resolution of the Security Council. The Court therefore rejected Libya's request for provisional measures because "the rights claimed . . . under the Montreal Convention cannot now be regarded as appropriate for protection by the indication of provisional measures". In a similar way here, there is no legal basis for the rights that are claimed by Paraguay. Those claims too are not an appropriate basis for the indication of provisional measures.

The Merits of Paraguay's Claim

3.14. Obviously, the Court cannot decide the merits at this stage in a case that is 96 hours' old. Nevertheless, in addition to assessing whether it has jurisdiction to proceed, the Court must weigh the totality of circumstances bearing on Paraguay's request for preliminary measures. In so doing, the Court must consider the doubtful nature of the core legal proposition that Paraguay is advancing — that the Convention requires the invalidation of every conviction and sentence of any person who has not received consular notification required by the Convention.

3.15. The difficulties with Paraguay's legal position must be confronted at this stage, and this ought to be an important element in assessing the appropriateness of provisional measures. As Dumbauld wrote at the time of the Permanent Court, "if it is apparent that the applicant cannot succeed in his main action, preliminary relief will of course be denied" (Edward Dumbauld, *Interim Measures of Protection in International Controversies* 165 (1932)).

A. Plain meaning of the text

3.16. What are the legal difficulties? To begin with, Paraguay's claim conflicts with the plain meaning of the text. Absolutely nothing in the language of Article 36, paragraph 1, of the Vienna Convention on Consular Relations (or in any other Article of the Convention) offers support for Paraguay's claim that failure of consular notification requires invalidation of any subsequent conviction and sentence of an alien.

3.17. Paraguay's claims follow from Article 36, paragraph 1, of the Vienna Convention, to which both the United States and Paraguay are parties. Article 36 establishes the basic régime for consular assistance to nationals who may be detained in the receiving State.

Article 36, paragraph 1, provides:

> "1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:
>
> *(a)* consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;
>
> *(b)* if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested . . . shall also be forwarded to the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph."

3.18. Mr. President, as was described by Ms Brown, when the competent federal authorities learned that Mr. Breard may not have been told when he was arrested that Paraguay's consul could be notified, the United States authorities investigated thoroughly. When they concluded that a violation of Article 36, paragraph 1, probably had occurred, they took action in co-operation with the Commonwealth of Virginia to try to prevent any recurrence. Senior United States officials apologized to Paraguay, and offered further consultations. As Ms Brown just noted, when Paraguay recently proposed that the two sides enter into formal consultations, the United States promptly agreed to that proposal. Unfortunately, however, and notwithstanding Article II of the Optional Disputes Settlement Protocol to the Convention, Paraguay chose to bring its action here instead.

3.19. Thus, there is no legal dispute between the United States and Paraguay regarding the need to give notification as provided for under Article 36, that such notification was not given, and concerning the need to take effective steps to prevent recurrence. The sole issue concerns the consequences under international law if an arrested alien is not told that his consul can be notified. The United States contends that the solution to such a breach of the treaty's requirements is to be pursued through normal processes of diplomatic apology, consultation and improved implementation.

3.20. Paraguay, however, asks this Court to impose much more drastic consequences. Paraguay's Application maintains that the necessary legal consequence for any such breach is that the ensuing conviction and sentence must be put aside. There is absolutely no support for this claim in the language of the Convention. The Court should not read into a clear and nearly universal multilateral instrument such a substantial and potentially disruptive additional obligation that has no support in the language agreed by the parties.

3.21. Mr. President, there are very few situations in which States actually have agreed by treaty that the failure to observe specific standards can be the basis for appeal to an international tribunal for possible reversal of a conviction or sentence. I have in mind here, for example, regional instruments and institutions such as the European Convention on Human Rights and the Strasbourg Court. Where States have elected to create such mechanisms, they have done so expressly and with great precision. They have not created such additional remedies by indirection or implication, as Paraguay asks the Court do here. Let me turn to the negotiating history.

B. Negotiating history

3.22. Likewise, there is no support for Paraguay's claim there. We know of nothing in the history — and Paraguay has pointed to nothing — even hinting that the Parties intended failure to comply with Article 36, paragraph 1, to invalidate subsequent criminal proceedings.

3.23. The Vienna Convention was negotiated on the basis of draft articles prepared by the International Law Commission. The relevant ILC proposals do not contain the obligation to inform an arrested person that their consul could be notified. That was added at the Conference. We have found nothing in the debates of the Conference supporting Paraguay's claim, but there are a number of indications to the contrary.

3.24. Article 36 was negotiated with great difficulty at the Vienna Conference. The final version was only agreed upon two days before the Conference ended. Some delegations supported the ILC's initial draft of Article 36, which would have required that receiving States automatically notify sending States' consuls if a national was arrested. A large number of other States strongly opposed this requirement. They argued, among other things, that it would impose an excessive administrative burden on the receiving State and that the national might not want his government authorities to know about his arrest. (Luke T. Lee, *Consular Law and Practice* (1990), pp. 138-139.)

3.25. Ultimately, a compromise had to be reached. The compromise involved a series of amendments to the ILC draft. I will not try to trace all of these for you, but I will mention one because it helps to show that States at the Conference clearly did not intend that failure of consular notification would invalidate subsequent legal proceedings. The negotiations began with the ILC draft providing for consular notification in the case of arrest. That was widely criticized as unreasonably burdensome and impractical. Accordingly, various narrowing amendments were offered by groups of countries.

3.26. One, offered by Egypt and accepted by the Conference, changed the initial language to state that the obligation to inform the sending State only arises if the national so requests. The delegate of Egypt explained his amendment as follows:

> "The purpose of the amendment is to lessen the burden on the authorities of receiving States, especially those which had large numbers of resident aliens or which received many tourists and visitors. *The language proposed in the joint amendment would ensure that the authorities of the receiving State would not be blamed if, owing to the pressure of work or other circumstances, there was a failure to report the arrest of a national of the sending State.*" (Twentieth Plenary Meeting on 20 April 1963, United Nations Conference on Consular Relations, *Official Records*, p. 82, at para. 62. Emphasis added.)

The explanation of this amendment (which was adopted by the Conference) clearly suggests that the Conference saw the normal processes of diplomatic adjustment as the means to address failure of a notification requirement. The Conference did not foresee that defects of consular notification would result in the invalidation of subsequent criminal proceedings. Had the parties thought so, the many States that already expressed fears about the burden of the notification requirement would surely have voted down the text that is before you today.

3.27. Other statements during the Conference reinforce that the Parties did not intend the Convention to alter the operation of domestic criminal proceedings. The delegate from the USSR stated that "the matters dealt with in Article 36 were connected with the criminal law and procedure of the receiving State, which were outside the scope for the codification of consular law" (*ibid.*, p. 40, para. 3). The delegate from Belarus expressed similar views, noting that "the Conference was drafting a consular convention, not an international penal code, and it had no right to attempt to dictate the penal codes of sovereign States" (*ibid.*, p. 40, para. 8). Such statements directly conflict with Paraguay's claim today. Thus, the negotiating history does not support Paraguay's broad view of the consequences of non-compliance with Article 36, and a variety of statements made during the debate support a contrary view.

C. State practice

3.28. Likewise, there is no support in State practice for Paraguay's position. As Ms Brown explained, after the Breard case initially came to the attention of the United States federal authorities, the United States Department of State surveyed the practice of the States parties to the Vienna Convention. That survey found no State — none — that adopted the position Paraguay urges on the Court here. Paraguay has referred to no such State practice here.

3.29. The few national court cases that we know have considered the matter have not reached the result urged by Paraguay. Lee's treatise *Consular Law and Practice* cites an Italian case where the Italian authorities failed to provide the required consular notice to Yater, a British national. According to Lee, the challenge to Yater's conviction was rejected.

> "The Supreme Court *(Cassazione)* held that the consular role in assisting the defence of his fellow nationals under the Vienna Convention on Consular Relations is of 'a complementary and subsidiary nature, and

> does not replace the right of the accused to make his own arrangements for his own defence'. Since Yater in this case had adequately defended himself during proceedings through a lawyer chosen by him, the plea was dismissed." (Luke Lee, *Consular Law and Practice*, pp. 150-151, citing *Cassazione*, 19 February 1973, *re Yater*. Summary and Commentary in 2 *Italian Yb. Int'l L.* 336-339 (1976).)

The issue also has been energetically litigated in United States courts. Indeed, Mr. Donovan, the distinguished counsel for Paraguay, has been a prominent participant in litigation in the United States urging that this approach be adopted as a matter of United States domestic law. However, no United States court has found that the failure of consular notification, standing alone, constitutes a sufficient basis for invalidating a sentence and conviction.

D. No injury to Mr. Breard

3.30. Finally, as Ms Brown has explained, the notion that Mr. Breard suffered injury because of any failure of consular notification is speculative and unpersuasive. Paraguay's Application asks this Court to indicate provisional measures largely on the basis of some bold assumptions about what Paraguay's consul might have done. In doing so, the Application presents an inflated and unrealistic description of a consul's functions in criminal matters. A consul is not a defence attorney. Consular protection does not immunize a national from local criminal jurisdiction. What a consul can do is help arrested persons arrange means for their own defence. A consul can notify an arrested person's family, or help to ensure that the defendant has local defence attorneys. A consul does not typically retain lawyers to defend her nationals; the United States does not do so, and Paraguay has not established that it normally does so either.

3.31. But, as we have shown, Mr. Breard was able to accomplish all these things quite effectively without the assistance of Paraguay's consul. He spoke English and had lived in the United States since 1986. After his arrest, he was in regular contact with his family. He was defended by able attorneys throughout his trial and the many subsequent legal proceedings. A consul could not have done more to enhance the effectiveness of Mr. Breard's legal defence.

E. Conclusion

3.32. For all of these reasons — the lack of any textual basis in the Convention, the lack of support in the negotiating history and State practice, and the absence of injury to Mr. Breard — Paraguay's basic claim in these proceedings lacks legal foundation. Because there is no basis for the remedy Paraguay seeks in the Convention, the Court lacks jurisdiction. The weakness of Paraguay's legal claim is also a compelling reason for declining to indicate provisional measures.

III. PROVISIONAL MEASURES AND THE RIGHTS OF THE PARTIES

3.33. Mr. President, my final section will be relatively brief. I will first address the role of provisional measures in relation to the protection of the rights of the Parties. I will explain why such measures should not be indicated in a form that would create a selective or unjust balance with regard to the Parties. I will then show how, in deciding whether to indicate particular provisional measures, the Court must consider whether those measures improperly prejudge the outcome of the dispute.

3.34. Mr. President, the provisional measures sought by Paraguay amount to a determination on the merits of this case. If the measures sought by Paraguay are indicated and implemented, Paraguay will have won, at least for a period of however many years may be required for the Court to arrive with its final judgment. Paraguay will have advanced its key objective through a hurried and unbalanced proceeding that cannot adequately address the serious legal issues that are at stake.

3.35. This cannot be reconciled with the regime for provisional measures envisioned under Article 41 of the Statute. Article 41 says that the Court may indicate, where circumstances require, "any provisional measures which ought to be taken to preserve the respective rights of either party". Take note : "the respective rights of either party". Provisional measures should not protect the rights of one party, while disregarding the rights of the other. But that is precisely what is requested here. As Paraguay has made clear, its goal here is to prevent the operation of the criminal laws of the Commonwealth of Virginia. It seeks to do so where there is no doubt that the accused committed very grave and violent offences, and where there have already been five years of extensive appellate litigation in national courts. As Mr. Matheson will elaborate in our next presentation, this would significantly impair the rights of the United States to the orderly and conclusive functioning of its criminal justice system.

3.36. Moreover, provisional measures should not be indicated in terms or in circumstances where they constitute a disguised adjudication on the merits. Professor Rosenne makes this point strongly in his remarkable new treatise :

> "The power to indicate provisional measures cannot be invoked if its effect would be to grant to the applicant an interim judgment in favour of all or part of the claim formulated in the document instituting proceedings." (Shabtai Rosenne, *The Law And Practice of the International Court, 1920-1996*, Vol. III, p. 1456.)

Nevertheless, this is precisely what Paraguay seeks. Paraguay is asking this Court for a concealed adjudication on the merits of this case through the guise of provisional measures.

3.37. This is exactly the type of case Judge Oda warned of in his recent essay on provisional measures. As he wrote :

> "In recent cases, the actual matters to be considered during the merits phase have been made the object of the requested provisional measures . . . [T]he applicant States appear to have aimed at obtained interim judgments that would have affirmed their own rights and preshaped the main case." (Oda, "Provisional Measures. The Practice of the International Court of Justice", in *Fifty Years of the International Court of Justice. Essays in Honour of Sir Robert Jennings*, Lowe and Fitzmaurice, eds., p. 553.)

3.38. Judge Oda goes on to warn of the implications of this, and of the possibility that :

> "the Court . . . be tempted to deliver an interim judgment under the name of provisional measures . . . If the tendency is to be for the Court to arrive at a quick decision on matters relating to the merits, while reserving for the future other much more judicious consideration on the question of

jurisdiction as well as the merits . . ., then the whole matter requires very careful consideration." (Oda, *op. cit.*, p. 554.)

3.39. Mr. President, Judge Oda is right to be concerned, this whole matter does require very careful consideration. Provisional measures should not be used as a vehicle for a hasty and legally unjustified decision on the merits of Paraguay's claim. And thus, for all of the reasons I have indicated — because of the lack of jurisdiction, because Paraguay's claim is unsound in law, and because the requested provisional measures are unbalanced and improperly prejudge the merits — the Court should reject Paraguay's request.

3.40. I thank the Court for its attention during a long presentation. I now ask that it invite Mr. Michael Matheson, Principal Deputy Legal Adviser, to present the next section of our argument.

ARGUMENT OF MR. MATHESON

CO-AGENT FOR THE GOVERNMENT OF THE UNITED STATES OF AMERICA

Mr. MATHESON : 4.1. Mr. President, distinguished Members of the Court, it is once again my great honour and privilege to appear before you on behalf of the United States. Mr. Crook has explained the basis for our contention that the provisional measures sought by Paraguay are not within the jurisdiction of the Court and lack any legal foundation. I will now explain the reasons for our view that the granting of the provisional measures sought by Paraguay would be contrary to the interests of the parties to the Vienna Convention on Consular Relations, the international community as a whole, and the Court as well.

4.2. Article 41 of the Statute of the Court provides in part that the Court "shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken . . .". This language clearly indicates that the Court may or may not choose to exercise this power in a particular case, depending on whether it believes the circumstances require it and whether it believes the particular measures proposed ought to be taken. (See, for example, *Aegean Sea Continental Shelf, Interim Protection, Order of 11 September 1976, I.C.J. Reports 1976*, separate opinion of President Jiménez de Aréchaga, p. 16.)

4.3. It follows from this that the Court should only grant provisional measures where it is satisfied that this would not only be fair and beneficial to the parties to the immediate dispute, but also would be consistent with the proper role of the Court, the interests of the parties to the convention in question, and the good of the general international community.

4.4. In the present case, Paraguay has asked the Court to suspend decisions of the criminal courts of a State. To our knowledge, this is the first occasion on which the Court has been asked to do so. In its request for provisional measures, Paraguay has asked the Court, in a matter of a few days, to scrutinize and suspend for an indefinite period the considered decisions of the trial and appellate courts of Virginia and the United States — decisions that have been taken after extensive judicial proceedings over a period of years.

4.5. This would be a very serious step, and one which could threaten serious disruption of the criminal justice systems of the parties to the Vienna Convention, and of the work of this Court as well.

4.6. There are currently over 160 parties to the Vienna Convention, of which over 50 have adhered to the Optional Protocol on Compulsory Settlement of Disputes. The parties to the Protocol include a number of populous States, such as France, Germany, India, Japan, the United Kingdom and the United States, where very large numbers of foreign nationals have immigrated or travelled for various reasons. It is inevitable that a significant number of crimes will occur in any population group of such a size, and in fact this has occurred. It is also to be expected that in a number of these cases, law enforcement authorities may commit, or be alleged to have committed, errors in the process of consular notification called for under the Vienna Convention.

4.7. The question is not whether such errors should be remedied. Rather, it is whether this should be left to the diplomatic process and to the domestic criminal authorities of the State in question, or whether this Court should assume the role of a supreme court of criminal appeals to deal with such cases by staying, reviewing and reversing domestic court decisions. Once the Court opens itself to this process, it can be expected that a great many defendants will press the States of their nationality to take recourse to it. This would include not only those who received no consular notification at all, but also those who may wish to claim that the notification received was deficient, incomplete, or tardy. It would include not only those who were genuinely prejudiced by the failure of consular notification, but also those who suffered little or no prejudice because they were nonetheless accorded full assistance of competent counsel and all the requirements of due process.

4.8. In principle, if such a remedy were available for violations of the Vienna Convention, why would it not also be available for alleged violations of other conventions when committed against foreign nationals in detention for criminal offences, such as bilateral treaties with provisions for consular protection, the International Covenant on Civil and Political Rights, or other agreements with provisions concerning rights to be accorded to aliens or to any person accused of criminal offences? If States may ask this Court to stay executions and nullify convictions on the basis of violations of the Vienna Convention, would they not feel able to do so under these other agreements as well?

4.9. It is difficult to believe that the parties to these conventions really intended that this Court serve as a supreme court of criminal appeals in this manner. It is difficult to believe that they intended to subject their domestic criminal proceedings, which typically include both trial proceedings and one or more levels of appellate review, to yet another stage of review by an international tribunal. As Mr. Crook demonstrated, we know this was not the case with respect to the Vienna Convention. We also know that such a role was not contemplated by the framers of the United Nations Charter and the Statute of the Court.

4.10. Yet this is precisely the message that the Court would give in granting the provisional measures sought by Paraguay in the present case. Delay of the execution of Mr. Breard until the Court's final disposition of the case, as Paraguay requests, would in practice mean the suspension of domestic criminal proceedings for years, whatever the final outcome. Many other defendants in many States could be expected to demand the same treatment, whether the alleged violations were serious or minor, and whether or not those violations led to any significant failures of due process in their conviction.

4.11. In other words, the indefinite stay of execution requested by Paraguay would not be a minor measure that simply preserves the status quo. It would be a major and unprecedented intrusion by the Court into the domestic criminal process that could have far-reaching and serious effects on the administration of justice in many States, and on the role and functioning of the Court.

4.12. All States have compelling interests in the orderly administration and finality of their criminal justice systems, particularly with respect to heinous crimes of the type committed by Mr. Breard. All States have compelling interests in avoiding external judicial intervention that would interfere with the execution of a sentence that has been affirmed following an orderly judicial process meeting all relevant human rights standards.

4.13. We submit that the Court should not take a step having such potentially far-reaching consequences on the basis of a few days of hurried consideration of a suit filed at the very last moment. Before taking any action to intrude into the criminal process of a State, the Court should require Paraguay to show that it does indeed have a basis for its claim in accordance with the normal, orderly process of full proceedings under Part III of the Rules of

Court. In this connection, the Court should go through the process called for by Article 63 of the Statute of the Court, which calls for notification of all States parties to the Vienna Convention so as to afford them the possibility of intervention or other submission of views to protect their own vital interests in the interpretation and application of the Convention.

4.14. Given these compelling reasons for refraining from the provisional measures sought, has Paraguay identified any basis for justifying such an extraordinary remedy? We maintain that this is not the case, since Paraguay has shown nothing to indicate that consular notification would have changed the result of the Breard case.

4.15. Neither Mr. Breard's guilt nor the heinous nature of his crime is at issue; he freely confessed in open court that he had committed the offence. In any case, his guilt was thoroughly established by compelling material evidence. Paraguay has not taken issue with this in its Application or in its argument this morning. There is no question of the execution of an innocent man.

4.16. Nor is there any evidence that Mr. Breard was prejudiced in any way by the apparent lack of consular notification. He had lived in the United States for six years and spoke English well. He understood the proceedings being conducted and participated actively in his own defence. He had full contact with his family and with persons in Paraguay. He had competent counsel well versed in the criminal law of Virginia. He was directly and strongly advised by his attorneys to refrain from the incriminating testimony which he insisted on giving. His conviction was reviewed and upheld by appellate courts of the United States and Virginia.

4.17. Paraguay's contention that the involvement of Paraguayan consular officials would have changed all this is nothing more than imaginative, but wholly unsubstantiated, and implausible speculation. The Court should not engage in an unprecedented intervention in the domestic criminal proceedings of a State on the basis of such implausible speculation. What a domestic appellate court would not do, this Court *a fortiori* should not do. This Court should not serve as a supreme court of criminal appeals in derogation of the normal operation of domestic criminal courts.

4.18. On the other hand, we fully recognize that Paraguay has a legitimate interest in ensuring that the provisions of the Vienna Convention are properly observed and that there is not a recurrence of the apparent failure of consular notification in the Breard case. Therefore, as Ms Brown described, the United States has taken extensive measures to ensure future compliance by State and local authorities.

4.19. Further, when Paraguay requested bilateral consultations under the Convention, the United States promptly agreed to consultations on all issues raised by the Breard case. We were specifically ready to discuss the possible procedural steps provided for in Articles II and III of the Protocol concerning conciliation and arbitration. However, Paraguay insisted on an immediate stay of execution as a precondition to refraining from immediate recourse to this Court, which the United States was not in a position to grant. The United States nonetheless remains prepared to engage in bilateral consultations aimed at encouraging more effective implementation of this Convention by both Parties.

4.20. Mr. President, for all these reasons, we believe that the granting of provisional measures sought by Paraguay would have serious negative consequences for the parties to the Vienna Convention, for the Court, and for the international community as a whole. We urge the Court not to take such a step, and certainly not after only a few days to consider the implications of such an action. We therefore encourage and urge the Court to exercise its power to deny the measures requested by Paraguay.

4.21. Once again, I thank the Court for its attention and consideration of these arguments. I now suggest that the Court recognize the Agent of the United States, Mr. Andrews, to conclude the argument of the United States and to present its Final Submission.

STATEMENT BY MR. ANDREWS

AGENT FOR THE GOVERNMENT OF THE UNITED STATES OF AMERICA

Mr. ANDREWS : 5.1. Mr. President, this morning the Court asked the Government of Paraguay to provide copies of two letters, one dated 10 December 1996 and one dated 3 June 1997. We would be pleased to provide the unanswered 7 July 1997 letter that the State Department sent to the Government of Paraguay, which was referenced by Ms Brown in her presentation. Mr. President and Members of the Court, this concludes the presentation of the United States. The submission of the United States is as follows : "That the Court reject the request of the Government of Paraguay for the indication of provisional measures of protection, and not to indicate any such measures."

5.2. We thank the Court for its kind attention to our presentations and its consideration of our arguments.

The VICE-PRESIDENT : Both Parties have now concluded the first round of their oral pleadings. The Court will adjourn now and resume at 3 p.m. to afford both Parties an opportunity to reflect. The Court stands adjourned until 3 p.m.

The Court rose at 12.50 p.m.

SECOND PUBLIC SITTING (7 IV 98, 3 p.m.)

Present : [See sitting of 7 IV 98, 10 a.m.]

The VICE-PRESIDENT : Please be seated. The Court resumes its sessions to hear the second round of oral submissions and I give the floor now to His Excellency Mr. Cáceres of Paraguay.

Mr. CÁCERES : I would like to ask the Court to call upon Mr. Donovan to offer Paraguay's rebuttal.

The VICE-PRESIDENT : Mr. Donovan, please.

REPLY OF MR. DONOVAN

COUNSEL FOR THE GOVERNMENT OF PARAGUAY

Mr. DONOVAN : Mr. President, Mr. Vice-President, distinguished Members of the Court.

It would be useful, I believe, to start this afternoon's session by summarizing where the Parties stand in light of this morning's submissions.

First, there is no dispute about the terms of the governing texts, Articles 5 and 36 of the Vienna Convention.

Second, there is no dispute, on the basis of the United States' submissions this morning, that the duties owed under the Vienna Convention to Paraguay and to its national were not fulfilled by the competent authorities of the United States, and hence, that there was a violation of the treaty.

Third, there is no dispute about the generally applicable principle of restitution — that is, that the author of an offending illegal act has the obligation to restore the prior situation.

Fourth, there is no dispute between the Parties that the object of provisional measures is to preserve the Parties' rights so that the Court will be in a position, upon rendering final judgment, to render an effective final judgment — a judgment that means something.

Fifth, and perhaps most importantly, there is no dispute that unless this Court orders provisional measures, Mr. Breard, Paraguay's national, will be executed on Tuesday 14 April.

In Paraguay's view, these points of agreement, standing alone, not only support an indication of provisional measures in accord with the Court's cases and governing Statute, but compel one. Nevertheless, we would like to briefly address several of the other points made by the United States this morning.

First, with respect to jurisdiction. The United States appears to contest the Court's jurisdiction on two converse grounds. On the one hand, the United States argues, it is plain — indeed the United States concedes — that there was a violation here. On the other hand, the United States argues, it is just as plain that the Vienna Convention affords no effective remedy for that violation. We, of course, agree that there was a violation ; we, of course, disagree that there is no effective remedy; but in any event, neither of these arguments can defeat the Court's jurisdiction in this case.

May I explain. There are at least two reasons why the United States' concession that there was a violation of Article 36 here cannot deprive this Court of jurisdiction over the dispute. The first was well stated by the United States in its oral arguments before this Court in the *Tehran Hostages* case (*I.C.J. Pleadings, United States Diplomatic and Consular Staff in Tehran*, p. 249, at p. 279 (18 March)). There the United States thought it prudent to address the argument, or the possible argument, that given that there was no possible legal justification for the actions by Iran of which the United States complained in that case, there might not be a dispute between the Parties coming within the Optional Protocol. And if the Court will permit me, I would remind the Court that one of the treaties on which the United States founded its claims in that case was the Vienna Convention on Consular Relations, and one of the bases of jurisdiction was indeed the Optional Protocol on which Paraguay founds jurisdiction in this case.

The United States described that argument, or any such argument, as "specious" *(ibid.)*. It said:

> "the sum and substance of every case brought to the Court under the compromissory clause of a treaty is the claim that the Respondent's conduct violates its obligations under that treaty. It would be anomalous to hold that the Court has jurisdiction where there is an arguable claim that a treaty has been violated but lacks jurisdiction where there is a manifestly well-founded claim that the same treaty has been violated. Such a contention has no support in the jurisprudence or traditions of this Court, or in the terms of the Optional Protocols." *(Ibid.)*

I continue to quote:

> "[i]ndeed any such rule would provide an incentive for States to flout their treaty obligations and to avoid offering any justification for their conduct in order to defeat the Court's jurisdiction" *(ibid.)*.

I would respectfully suggest that the same reasoning applies here. A State party should not be permitted to divest the Court of jurisdiction by, in effect, confessing error, by stating, "yes indeed our obligations were not complied with; we agree with the relevant obligation; and therefore there is no dispute" — for all the reasons well stated by the United States in its submissions in the *Tehran Hostages* case.

The second reason that the concession of a violation cannot deprive this Court of jurisdiction is that, as this very case amply demonstrates, disputes about the "interpretation and application" of the Convention may well arise from disagreements about the consequences that should flow from a given violation. It may well be in this case that the Parties will be able to reach a stipulation with respect to the relevant events, and indeed perhaps reach a stipulation as to the underlying act or omission that brings the Parties to this Court, and then move to a remedies phase, or a phase that would address consequences that flow from those events. But that does not change the fact that there is a dispute here as to the interpretation and application of the treaty. Indeed, I would suggest that the United States' own arguments this morning suggest that there is very much a disagreement on the subject of what consequences should flow from the omission that is not, itself, in issue.

The United States appears to have made two additional points with respect to jurisdiction that I would also like to address.

First, in a least one formulation this morning, the United States suggested that there was no jurisdiction because Paraguay had no legally cognizable claim. We disagree with that statement, of course, with respect to Paraguay's claim, but I note for the moment that it would in any event not afford a basis for denying jurisdiction ; it is an argument properly addressed to the merits of the claim.

Second, the United States referred to Articles II and III of the Optional Protocol. I simply want to note that this Court made plain, again in the *Tehran Hostages* case, both in the provisional measures Order and in its final Judgment, that those Articles do not in any way affect the compulsory jurisdiction of this Court under Article I.

I would like now to address several of the circumstances that the United States suggested are relevant to Paraguay's request.

First, the United States suggested that somehow Paraguay should be penalized for having filed its Application this past Friday, in light of the impending execution on 14 April.

This Court, I believe, will appreciate the magnitude of a decision by a Government like that of Paraguay to institute proceedings in the International Court of Justice against the United States. Needless to say, that is not a decision that is taken lightly. As we explained this morning, even last week there were discussions between the Parties as to ways to avoid the filing that was finally made late in the day on Friday.

As the United States itself advised the Court, those discussions foundered when it became clear that the United States was not prepared to take steps to halt the impending execution pending further discussions between the Parties, or pending some alternative means of dispute resolution. I add parenthetically that that is another reason why any recourse to Articles II and III was not available at this point, but of course an indication of provisional measures, and the continuance of this proceeding, will in no way make impossible further discussions on those topics. But for present purposes, if the Court were now to penalize Paraguay for its efforts to amicably resolve the dispute and to take all steps to avoid having to come to this Court, it would create what we would respectfully suggest would be an unwise disincentive to parties who wish to take every step to avoid a filing here. For that reason, we would respectfully suggest that that element should play no role in the Court's deliberations.

We would further suggest that it would be particularly inappropriate to allow any such circumstance to affect the Court's deliberations in this case.

As has been mentioned, Paraguay here went the extra mile to avoid coming to this Court. It took what we believe is a perfectly justifiable, but nonetheless unusual, step of filing a lawsuit first in the United States courts, asserting its own rights under the Vienna Convention, and seeking relief in the form of an injunction against further enforcement of the conviction and sentence of its national. Paraguay took the same position in that proceeding that it takes here — that is, it did not contest the authority of Virginia's officials to enforce its criminal law, and it did not contest the authority of the Virginia officials to re-try Mr. Breard if Paraguay received the relief it requested, if Virginia officials were so advised, which Paraguay fully expects they would be.

Because there has been some discussion of those proceedings, I would like to address two aspects of those proceedings in order to clarify the record before the Court.

First, there was a suggestion this morning that Paraguay at some point in those proceedings suggested that this case should not come before this Court, that the United States courts were the appropriate forum. I understand the

United States is going to provide the Court with a 3 June diplomatic letter. We are going to provide the Court as well with a letter that may shed some light on that exchange, which was a letter sent by Paraguay's counsel to counsel for the United States in the domestic litigation, which is the Department of Justice, in response to the position taken by the United States in the domestic litigation.

If the Court will permit me a moment.

In the initial proceeding in the District Court — that is, the federal trial court in the United States — the court held that Paraguay had standing to sue for breach of a treaty in the United States courts. It dismissed the suit, however, on an alternative jurisdictional ground that has to do with the constitutional structure of the United States, and the authority of a federal court to impose remedies against state officials. Paraguay appealed that decision.

In the Court of Appeals the United States filed a brief, as *amicus curiae*, in which it urged the Court of Appeals not to rely on the ground relied upon by the District Court, but instead to affirm on the alternative jurisdictional ground that a suit on a treaty by a sovereign in a court in the United States raises a non-justiciable controversy.

In the course of that brief, the United States took the position that in fact the proper fora in which to resolve the dispute were diplomatic negotiations or this Court. At the same time, the United States suggested an argument, which perhaps presaged the argument it makes here, that there would be no jurisdiction in this Court given that the Parties agreed on the obligations imposed by the Vienna Convention. In response to that position by the United States, Paraguay's counsel wrote a letter which we will happily provide to the Court, which stated what I have said this morning, that Paraguay had determined that it was appropriate to seek relief in the first instance from the municipal courts of the United States. Had Paraguay been able to obtain effective relief, the Parties may never have come before this Court. Paraguay did not obtain that relief, but Paraguay has never suggested that by filing suit in the courts of the United States it would somehow be foreclosed from its rights under the Optional Protocol. The suggestion by the United States that the United States courts are in some way the appropriate forum is a bit difficult to understand in light of the position that the United States took in the domestic litigation — that a sovereign, such as Paraguay, should not be permitted to sue for breach of treaty in those courts.

There is a second aspect of the United States litigation that I believe requires clarification after this morning's submissions.

The United States referred to some litigation in the United States, relatively recent litigation, arising from claims under the Vienna Convention in death penalty cases. No court in the United States has yet reached the merits of any such claim. I would like to briefly describe the two kinds of claims that have arisen, and perhaps give the Court some appreciation of the dilemma of a Government like Paraguay that seeks to vindicate its rights.

In the first instance there have been two cases by sovereigns. The first is that by Paraguay, and the second is a suit modelled on Paraguay's action that was filed by the United Mexican States in an attempt to halt the execution of one of its nationals. In both cases the District Court dismissed on the constitutional immunity ground that I have just described, and in both cases the Court of Appeals affirmed on that ground. (See *Paraguay* v. *Allen*, 949 F. Supp. 1269 (E.D. Va. 1996), aff'd. 134 F. 3d 622 (4th Cir. 1998), petition for cert. filed, 66 *USLW* 3577 (U.S. 24 February 1998) (No. 97-1390); *United Mexican States* v. *Woods*, No. CV-97-01075 (D. Ariz. 1997), aff'd. 126 F. 3d 1220 (9th Cir. 1998), petition for cert. filed, 66 *USLW* 3577 (U.S. 18 February 1998) (No. 97-1365).) In other words, in neither case did the court reach the merits of the Vienna Convention claim. Indeed, in Paraguay's lawsuit, the court emphasized the importance of the Vienna Convention, but simply held that it was disabled by the XIth Amendment to the United States Constitution from ordering the relief sought against state officials.

In the second category of cases are federal *habeas* claims by prisoners themselves seeking to attack their convictions on the basis of the Vienna Convention and a failure to provide the required notification. In all of those cases of which I am aware, and there are now propably three or four, the claim had not been raised until the prisoner had reached a federal court on a *habeas* petition — that is, the claim had not been raised in the proceedings in the state court, as in Mr. Breard's case, and had not been raised in the state *habeas* proceedings. In that situation, the holdings are uniform, thus far, that the stringent limitations that the United States Supreme Court has laid down and Congress has recently codified with respect to *habeas* petitions generally, and death penalty *habeas* petitions in particular, bar the *habeas* petitioner from raising the claim. In other words, those courts, too, have not reached the merits, although I should note that in Mr. Breard's own case, again, one of the judges on the panel — although he concurred in the judgment saying that the court could not provide relief — emphasized the importance of the rights at issue.

If you put together the two cases involving Mr. Breard — that is, Paraguay's case asserting its rights and Mr. Breard's case asserting his rights — the court can appreciate the difficulty. The claim here arises from a failure to notify. Notwithstanding the discussion by the United States this morning with respect to the Vienna Convention and what the various discussions at the Conference were, it seems to me that there can be no dispute that the obligation in Article 36, paragraph 1 *(b)*, requiring the detaining State to advise the national of his right to consult consul, has a very obvious purpose — that is, to ensure that that detainee is knowledgeable, becomes advised of his or her rights. And yet the combination of the holdings in Mr. Breard's case and in Paraguay's own suggest that, even in a case where the claim arises from failure to notify, and the *habeas* petitioner has learned of the rights under the Vienna Convention only after he has gone through the proceeding in which he has been deprived of them, he is too late to raise them. Indeed, without going into the nuances of United States law, effectively the holding in Paraguay's own case, because of the peculiar limitations on federal courts' authority to provide relief, was to the same effect — that because Paraguay was, in the understanding of the Court, attacking the state judgment, Paraguay's suit came too late because it would be undoing prior state action.

I do not mean to suggest that those cases are relevant to this request. To my mind, the only relevance here is that clearly Paraguay should not be penalized on some suggestion that it has delayed. Clearly there have been substantial efforts to resolve the dispute prior to reaching this Court.

There is, however, one more line of cases in the United States that may be relevant. At least two courts have addressed the failure to notify under the Vienna Convention and the possible impact that might have on the enforcement of a conviction. We would be happy to provide the Court with a copy of the case that I am about to refer to, but it is a case from the United States Court of Appeals for the Ninth Circuit — that is, one of the federal courts of appeals. That case considered federal regulations that require federal officials, immigration officials, to advise an alien detainee of his or her rights under the Vienna Convention. The regulations are explicitly intended to implement

Vienna Convention obligations. The federal court to which I refer did set aside a conviction for illegal entry after deportation as a result of the immigration authority's failure to comply with this regulation. The court reversed the conviction on the ground that the underlying order of deportation was invalid because the arresting authorities had failed to notify the defendant at the time of his initial detention of his right to contact a consular official. The court went further to determine that prejudice was present, and it therefore afforded relief. It built on, by the way, an earlier case from the same court of appeals. In short, there is authority in the United States that, in fact, a failure to comply with Vienna Convention obligations can have an effect on the validity of a conviction obtained in the tainted proceedings and I shall return to that point in a few moments when talking about the United States' submissions on the merits.

I would like to address now the United States' suggestion that there is no legally cognizable claim in so far as it might be relevant, not to jurisdiction, but to the circumstances informing the Court's decision whether to grant provisional measures.

I should start by noting that whatever the weight of this factor in another case, it is hard to see how it could weigh against provisional measures here, where there appears to be agreement on the failure to comply with the underlying obligations, and the dispute is very much about the consequences that should flow. It would seem to me that the Court should exercise serious caution in deciding, in the face of a conceded violation, that the applicant State does not bring a sufficiently weighty case to warrant provisional measures. I would think that that caution would apply particularly where the suggestion of the United States that there is no remedy, and hence no legally cognizable claim, appears to contradict so squarely the fundamental principle as to the remedy of restitution, the applicability of that remedy in the event of an internationally wrongful act, and the substance of that remedy — that is, to restore the situation that existed prior to the wrongful act. Given that the United States' position is so squarely inconsistent with that basic understanding, I would think the Court would want to exercise extreme caution before reaching a decision that somehow the Vienna Convention was intended as an exception to that principle.

In any event, however, we believe that the United States' submission does not hold up even on its own terms.

The United States' argument is essentially that the Court should conclude that Paraguay is not entitled to the remedy it seeks because one looks in vain, in Article 36 or elsewhere in the Vienna Convention, or even in the negotiating history, for confirmation that that remedy is available. With all due respect, we would suggest that the United States is engaged in a misguided search. One need not find the remedy in the text of the Convention. If the United States' argument were accepted, it would be necessary to reproduce the draft articles on State Responsibility in every treaty, and surely that is not the expectation of treaty drafters. Instead, the fundamental understanding with respect to remedies is that they form part of the legal context in which any treaty must operate. Therefore, the fact that one does not find an explicit confirmation of the remedy Paraguay seeks in either the Optional Protocol or the Vienna Convention itself should certainly not lead to the conclusion that that remedy is not available.

Indeed, to reach that conclusion, this Court would have to repudiate a long line of authorities, because it has never imposed a requirement, in considering whether a particular remedy was available, that that remedy appear in the given international instrument on which the claim was founded. Again, if one would recall the eminently justifiable range of remedies this Court provided in the

Tehran Hostages case, one would have a hard time finding explicit confirmation for each of those remedies in the underlying instruments. In effect, the United States' argument here, and its reading of the Vienna Convention, would effectively limit this Court to grants of declaratory relief without the power to order a remedy. That role is plainly inconsistent with the understanding of parties who both adhere to an international treaty and subscribe to a dispute resolution protocol. It is intrinsic to the notion of a violation, as *Chorzów* itself suggests, that consequences flow from that violation.

Again, however, even on the United States' own terms, even if one were looking to the Vienna Convention itself, there would not be the support that the United States finds.

First, with respect to Professor Lee's treatise. The case to which the United States referred, although it is provided only a brief account in the treatise, by no means suggests that a remedy is not available. Indeed, the Italian court actually went to the Vienna Convention issue, or so it appears from the brief account in Lee, and decided that the applicant could not show prejudice. From the brief account in Lee, it appears that that case actually supports Paraguay's argument that a remedy is available even if it may affect the validity of the underlying conviction. Lee then follows the discussion of the Italian case with a discussion of the two cases from the United States that I have just described, which do draw consequences as to the validity of an underlying conviction from a failure to notify under Article 36. To the extent that it is relevant now — and I will address that issue in a moment — the weight of Lee's treatise suggests that Paraguay is entitled to a remedy.

Likewise with respect to the negotiating history, the United States points to certain sections of that history to support a contention that the parties did not intend the Convention to alter the operation of domestic criminal proceedings. Yet the history on which the United States bases its argument supports an opposite conclusion. In particular, the United States referred, but not by name, to statements by Mr. Khlestov, a delegate of the Soviet Union, and Mr. Avakov, a delegate of Byelorussia, and presented those statements as supporting the view that the Conference did not intend the Convention to alter, or have any effect on, domestic criminal proceedings. In fact, Mr. Khlestov argued further that paragraph 2 of Article 36 as then drafted, and as ultimately adopted by the Conference, was an attempt to interfere with the internal affairs of States by hampering the administration of justice in regard to aliens, and that that version would make it difficult for States to exercise their sovereign right to prosecute aliens who broke the law. (See UN, *GAOR*, Conference on Consular Relations, 12th plen. mtg., agenda item 10, paras. 2-9. UN doc. A/Conf.25/SR.12, 17 April 1963, p. 1, reprinted in 1 United Nations Conference on Consular Relations, *Official Records* 40 (1963) *(Official Records)*.). Mr. Khlestov and Mr. Avakov spoke in support of restoring the ILC's draft of paragraph 2 of Article 36. (See *ibid.*, paras. 3-4 and 8; see also UN doc. A/Conf.25/L.34, 16 April 1963, reprinted in 2 *Official Records* 168 (text of proposed Soviet amendment).) Mr. Evans, a delegate of the United Kingdom, characterizing the Soviet proposal, said that "... [t]he Soviet amendment was not acceptable, because it meant that the laws and regulations of the receiving State would govern the rights specified in paragraph 1 provided that they did not render those rights completely inoperative". (See UN, *GAOR*, Conference on Consular Relations, 12th plen. mtg.; agenda item 10, para. 6. UN doc. A/Conf.25/SR.12, 17 April 1963, p. 1, reprinted in 1 *Official Records*.)

In the event, however, the Conference chose to reject the proposed Soviet amendment. (See *ibid.*, following paragraph 9.) Thus, so far as we understand the statements, the negotiating history on which the United States relies was in support of an alternative provision that would have diluted the effect of that Convention specifically with respect to its possible effect on criminal proceedings. Thus, the negotiating history supports the notion that the Convention in appropriate instances might even subordinate municipal criminal procedures to the provisions of Article 36, paragraph 1.

The United States has also suggested that it would be unwise for this Court to grant Paraguay the remedies it seeks because that would somehow open the floodgates to claims like that brought by Paraguay.

We would respectfully submit, in the first instance, that the fact that others might have the same right that Paraguay might have should not deter the Court from recognizing that right in Paraguay ; that would be fundamentally inconsistent with the judicial role. But, in any event, we do not believe that there is any basis for the scare the United States raises. Contrary to the characterization of the United States, Paraguay's Application is not an appeal to this Court, and the question before this Court is not whether, in every criminal proceeding involving a foreign national, a violation of the Vienna Convention requires a new trial. Paraguay's action is not an appeal ; it does not ask the Court to review or reverse any judgment of a municipal court ; and it does not ask the Court to review the proceedings in that court or to review the judgment of that court. Further, the question is not what remedy would be required in every criminal proceeding everywhere in the world ; the question is what can Paraguay show with respect to this proceeding, and on the basis of that showing, what relief would it be entitled to. The facts relevant to that enquiry are quite discrete ; and to the extent that, as the United States suggested this morning, it would require a consul to bring on evidence with respect to State practices or the like, if a court found that relevant, the foreign sovereign could certainly make a decision when it sought the relief whether or not it was prepared to do so.

As this case demonstrates, cases of this kind would prompt a sovereign to come to this Court only with the greatest reluctance. Even on the terms of the United States' own argument, we do not think there is any basis for concern.

Finally, the United States suggests that Paraguay's request would require this Court to anticipate a judgment and would in fact anticipate a judgment in favour of Paraguay. That suggestion is belied by the very disciplined and narrowly tailored relief that we request. But before addressing the relief Paraguay requests, I would like to examine the United States' submissions in the light of the concern that the United States itself raises — that is, that an indication of provisional measures here might anticipate a judgment.

The United States comes to this Court and asks the Court to reject Paraguay's request on the basis of the facts that it says it will be able to prove, on the basis of a survey of State practice of which we were just advised this morning, and on the basis of a showing on the legal rights at issue that I have just addressed. Clearly, the Parties disagree about certain aspects of the consequences of the United States' actions. If the Court were to rest a denial of the request for provisional measures on an assumption that the United States will be able to prove its facts and Paraguay will not, that indeed would anticipate a judgment. Equally, to the extent an informal survey of State practice might be relevant to the eventual determination of this Court, surely the Court should not make a decision on the basis of the advice provided over this lectern as to an informal survey conducted by the United States Department of State. That, too, would surely anticipate the proof, and hence the judgment, that would be elicited at the merits phase. And, finally, the United States asked this Court to reject Paraguay's claim on the basis that it has no legally cognizable claim. Again, while we disagree with that suggestion, and while we believe the suggestion is not supported even by the authorities that the United States cites, nothing would so surely anticipate a judgment by this Court than a conclusion that notwithstanding the violation in this case, the remedy Paraguay seeks is not available.

Conversely, Paraguay asks for provisional measures that are extremely narrow. The only thing, in effect, that Paraguay asks this Court to do at this time is to order that the United States ensure that Mr. Breard is not executed while this case is before the Court. We would welcome the views of other States parties that might intervene. We are certain that they would enlighten the Court and we would fully expect the Court to take into account the views of any other State that was motivated enough to join these proceedings. But surely before receiving those views, the Court should ensure that the case stays before this Court — that the case remains in its full dimension.

As I stated this morning, even if this Court grants the interim relief, Mr. Breard will remain in Virginia's custody. If the United States prevails on the merits on this case Virginia will be able to schedule a new execution date and put him to death. Surely the United States does not mean to suggest that the delay in executing the sentence of death overrides Paraguay's interest in the life of its national. To the extent that the Court would wish to balance in any way the effect of these interim measures on the two Parties, or in any way to protect against a decision here, either granting or denying the provisional measures Paraguay seeks, that anticipates its judgment, the Court plainly, Paraguay respectfully submits, must grant the narrowly tailored measures Paraguay seeks.

I very much appreciate the Court's courtesy this afternoon.

The **VICE-PRESIDENT**: Before you conclude, the President would like to address a question to you.

The **PRESIDENT**: Mr. Donovan, you referred to two United States cases which did overturn earlier decisions on the grounds of failure to comply with the Vienna Convention on Consular Relations, if I understood you correctly. Did those decisions overturning the earlier judgments lead to retrials on the original charges or simply in dismissal of the original charges.

Mr. **DONOVAN**: I do not know the subsequent history of those cases. I do not believe that there is anything in those cases which would suggest that a retrial would not be possible and certainly, as I have said, it is not Paraguay's position here that a retrial would be barred. But I cannot definitively answer the Court's question, but I would be happy to do so when we provide those cases subsequently.

The **VICE-PRESIDENT**: May I ask what is the earliest time you could furnish an answer to that question.

Mr. **DONOVAN**: This afternoon — that is, in so far as the answer is disclosed by the published accounts of those opinions.

The **VICE-PRESIDENT**: That concludes the second round of oral pleading of Paraguay and we will have a short adjournment to enable the United States to make its submissions.

The Court adjourned from 3.50 to 4.20 p.m.

The VICE-PRESIDENT : We meet now to hear the second round of oral submissions of the United States, and I give the floor to Mr. Andrews, Legal Adviser to the United States Department of State.

Mr. ANDREWS : Mr. President, I would like to call to the podium Mr. John Crook to respond on behalf of the United States.

REJOINDER OF MR. CROOK

COUNSEL FOR THE GOVERNMENT OF THE UNITED STATES OF AMERICA

Mr. CROOK : Mr. President, Members of the Court.

In our final presentation this afternoon we will make, I believe, six points, attempting to bring together and respond to a number of the considerations that distinguished counsel for Paraguay introduced in his rebuttal. I shall try not to be too long.

My first point is this. It seems to me that throughout this case, and certainly in the rebuttal we have just heard from Paraguay, there has been a signal avoidance of the burden of proof that the Applicant here must bear. They have in fact proved very little, if anything. Mr. Donovan in his presentation this afternoon tried to make up some of the deficiencies by seeking to build upon the evidence and argumentation that we gave you this morning. As to his arguments, I would simply invite the Court to consider the sources and determine in its own mind whether our reading of them, or Mr. Donovan's reading of them, is the better. But it does seem to me that it is an anomalous position ; a peculiar situation where the burden of the Applicant's proof is that the Respondent did not disprove the Applicant's assertions to the satisfaction of the Applicant. I would certainly disagree with that characterization, but it does seem to me unsound in relation to the burdens that the Applicant here must bear.

There is one key issue here that I think we should take note of. It is an issue to which counsel for Paraguay did not refer. That is the key issue of whether in fact consular access in this case would have made any difference. Counsel for Paraguay ignored that point in his summation, and it seems to me that it is an important point and is one that cannot be ignored. All of Paraguay's case here rests on the factual premise, the assumption, the belief, that things would have been different had a Paraguayan consul been involved. For all the reasons that we suggested, the reasons that Ms Brown suggested, that seems to us to be not the case. The burden here is on the Applicant, the burden has not been met.

My second basic point, Mr. President, is that the Applicant here seems to have responded to large parts of the United States submission by ignoring them or trivializing them. They ignored Ms Brown's long and I think very informative description of the realities of consular practice. Paraguay had nothing to say about that this afternoon. In large measure they ignored the indications that we brought to you regarding the realities of how States interpret and apply their obligations under the Vienna Convention on Consular Relations. They ignored altogether the circumstances of Mr. Breard's trial, the offences for which he was charged, the adequacy of his counsel, the extensive nature of the appellate remedies that he pursued. They ignored large parts of the United States submission.

My third major point is that the presentation here by distinguished counsel for Paraguay showed an undue preoccupation with the domestic litigation in the United States in which matters similar to these are being addressed. Counsel for Paraguay indicated that in his view those cases were not relevant. We would agree, and we therefore will not seek here to re-argue them. I do wish here though to respond particularly to the cases that were raised at the last minute, and that were the occasion of the question from President Schwebel. The Applicant will presumably make those available to the Court, and the Court can inspect them and come to its own judgment regarding their implications. Our recollection is that the cases that the Court has requested were immigration cases involving deportation orders, and not criminal cases. That is our recollection, and we suffer from not having the text with us, but it is our belief that they turned not on the Vienna Convention on Consular Relations obligations as such, but on the fact that the Immigration Service had failed to follow its own regulations calling for consular notification. Under federal law, federal agencies are required to follow their regulations, and that was the basis for the courts' decisions on those cases. That is our recollection. If we have mischaracterized them, the Court will soon have the opinions and will be able to see, but that is our understanding of what was involved in those cases.

My fourth point is that it seems to me that the Applicants in this case have dealt with significant parts of the United States presentation this morning by ignoring it — or in any case by trivializing the implications. We spent a good deal of time here going through the implications of the course of action that is advocated by Paraguay, for example, for other Governments, the other parties to the Vienna Convention on Consular Relations.

Counsel for Paraguay responded to that essentially by trivializing the point, saying we have one case and one case only here, and that's all the Court need concern itself about. With respect, Mr. President, that seems to me not to be good enough. With respect to the concerns of the United States, again, counsel for Paraguay minimized or trivialized the consequences of the remedy that they seek here. Again, I think in all fairness, that is not good enough. The United States has significant interests in the oderly and authoritative administration of its criminal law, certainly in a case where the murder took place in 1992, the trial took place in 1993, and there appears to be no dispute between the Parties as to the guilt of the accused.

I think the same observation holds true as well concerning our points regarding the implications of the remedy sought by Paraguay for the Court. The concern is a real one, the implications for other countries and other situations are real, they cannot be ignored.

The fifth point is the rather basic question. Is there a remedy? And the associated question, is there jurisdiction here? For the reasons that I indicated, it seems to me that the Court must consider the likelihood of Paraguay being able to show that the remedy that underlies their whole case exists and is available to them within the four corners of the Vienna Convention on Consular Relations. It is not appropriate for me to re-argue the points I made this morning but I simply invite the Court to consider them. The point that there is no support in the text, the point that there is no support in the history, the point that there is no support in practice. I think it is a fair gloss that Paraguay is quite unlikely to be able to show that the remedy it seeks either is available or, in any case, is to be found within the sphere of the Vienna Convention on Consular Relations which of course is the requirement for there to be jurisdiction. We are at something of a disadvantage because Paraguay, as the Applicant, has never really made the case. We have sought to respond, Paraguay has then tried to make its case by dealing with our response. We are left in this very unsatisfactory situation, Mr. President, that the basic burden of the Applicant has not been met. I would agree his with distinguished counsel for Paraguay who, in his presentation this afternoon, used words to the effect — and I freely admit that this a paraphrase and not a quote; I hope this is a fair paraphrase — that to find the remedy, you must go beyond the text of the treaty. That is the problem, there is no jurisdiction. The Applicants seem unlikely to prevail on the merits.

Let me turn to my sixth and final point and that is the reference to the *Hostages* case. Now, there was, I think, perhaps a misunderstanding of our position. I want to deal with it, because I think it is important. It is not our contention here that the Court is divested of jurisdiction by reason of the fact that we have confessed error and admitted that Mr. Breard was not given consular notification. That is not our point at all. Our point is the much broader one that I have just discussed, that the remedy that is sought here is a remedy that goes far beyond the scope of the Vienna Convention and far beyond the scope of the jurisdiction of the Court.

Let me respond to other points regarding the *Hostages* case. It does seem to me that it is — unseemly is perhaps too strong a word — but it is not quite right to draw upon the *Hostages* case as the precedent for action by this Court here. The *Hostages* case involved a much more aggravated situation, the continued detention of a large number of hostages in conditions of apparent danger, in violation of fundamental rules for the protection of diplomats and consuls. It was a profound, potentially very dangerous, disruption of international relations. It perhaps trivializes that case to analogize it to a situation where the Applicant is seeking not to deal with matters of great consequence at stake in the *Hostages* case, but rather to disrupt the operations of the criminal courts of a party to the Statute of this Court. The analogy is not appropriate and it is not one that should illuminate the deliberations of this Court.

Mr. President, I apologize that these remarks have been somewhat disjointed. The circumstances are a bit difficult, but I hope they have been of some use in clarifying our position. As always my delegation appreciates the courtesy of the Court in listening to our presentation. You have heard already the submission of the United States Agent and it is only for me to thank the Court.

CLOSING OF THE ORAL PROCEEDINGS

The VICE-PRESIDENT : This brings us to the end of these oral hearings. I would like to express on behalf of the Court its warm thanks to the Agents, counsel and advocates of the Parties for the quality of their arguments and the courtesy and co-operation they have shown. In accordance with the usual practice, may I ask the Agents to remain at the disposal of the Court for any further information which it might need and, subject to that, I now declare closed the oral hearings on the request for the indication of provisional measures in the case concerning the *Vienna Convention on Consular Relations (Paraguay* v. *United States of America)*. The Court will now withdraw to deliberate. The Order containing the decision of the Court will be read at a public sitting to be held on Thursday 9 April. There being no other matters before it today, the Court will now rise.

The Court rose at 4.35 p.m.

THIRD PUBLIC SITTING (9 IV 98, 2 p.m.)

Present: [See sitting of 7 IV 98, 10 a.m.]

READING OF THE ORDER

The VICE-PRESIDENT, Acting President: The sitting is open. The Court meets today to deliver its decision on the request for the indication of provisional measures submitted on 3 April 1998 by the Republic of Paraguay in the case concerning the *Vienna Convention on Consular Relations (Paraguay* v. *United States of America)*.

It will be recalled that the proceedings were instituted on the same day by the filing in the Registry of the Court of an Application by the Government of the Republic of Paraguay against the United States of America; and that Paraguay, in its request for the indication of provisional measures submitted pursuant to Article 41 of the Statute of the Court and Article 73 of the Rules of Court, stated that:

> "By order dated 25 February 1998, the Circuit Court of Arlington County, Virginia, United States of America, has ordered that on 14 April 1998, pursuant to Virginia Code § 53.1-234, Mr. Breard be electrocuted or injected with a lethal substance until he is dead."

Paraguay further indicated that:

> "Under the grave and exceptional circumstances of this case, and given the paramount interest of Paraguay in the life and liberty of its nationals, provisional measures are urgently needed to protect the life of Paraguay's national and the ability of this Court to order the relief to which Paraguay is entitled: restitution in kind. Without the provisional measures requested, the United States will execute Mr. Breard before this Court can consider the merits of Paraguay's claims, and Paraguay will be forever deprived of the opportunity to have the *status quo ante* restored in the event of a judgment in its favour."

I shall now read the Order made by the Court in this request, omitting as is customary the preliminary formal recitals. I will therefore begin the reading at paragraph 17 of that Order.

[The Vice-President, Acting President, reads from paragraph 17 to the operative clause of the Order [1].]

I shall now call upon the Registrar to read the French text of the operative clause of the Order.

[Le greffier lit le dispositif en français [2].]

---

[1] *I.C.J. Reports 1998*, pp. 253-258.

[2] *C.I.J. Recueil 1998*, p. 258.

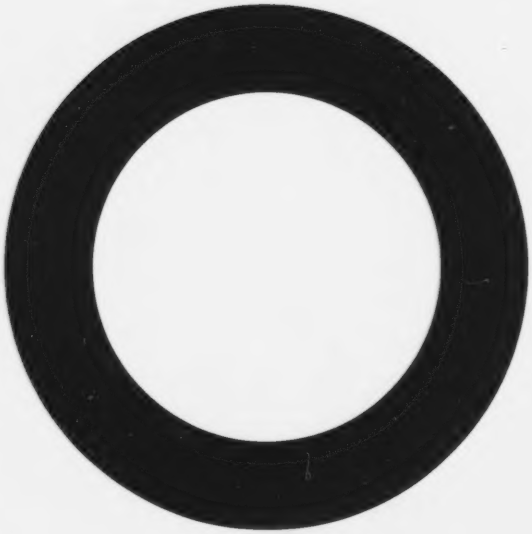
The decision of the Court is unanimous; the President of the Court and Judges Oda and Koroma append declarations to the Order.

In accordance with practice, the Order has been read today from a duplicated copy of the text, a limited stock of which will be available to the public and to the press. The text of the Order is also available, as from now, on the Website of the Court. The usual printed text of the Order will be available in the near future.

There being no other matters before the Court today, I declare the present sitting closed.

(*Signed*) C. G. WEERAMANTRY,
Acting President.

(*Signed*) E. VALENCIA-OSPINA,
Registrar.



AMENDED APPLICATION INSTITUTING PROCEEDINGS SUBMITTED BY THE GOVERNMENT OF PARAGUAY

REQUÊTE INTRODUCTIVE D'INSTANCE MODIFIÉE PRÉSENTÉE PAR LE GOUVERNEMENT DU PARAGUAY

On behalf of the Republic of Paraguay, and in accordance with Article 40, paragraph 1, of the Statute of the Court and Article 38 of the Rules of Court, I respectfully submit this Amended Application to take account of the actions of the United States of America with respect to Angel Francisco Breard following the institution of these proceedings and the issuance of this Court's provisional measures Order on 9 April 1998, which constitute further violations of the international obligations owed to Paraguay by the United States. The Court has jurisdiction pursuant to Article I of the Optional Protocol concerning the Compulsory Settlement of Disputes to the Vienna Convention on Consular Relations.

PRELIMINARY STATEMENT

1. Article 36, subparagraph 1 *(b)*, of the Vienna Convention on Consular Relations (done on 24 April 1963) (the "Vienna Convention") requires the competent authorities of a State party to advise, "without delay", a national of another State party whom such authorities arrest or detain of the national's right to consular assistance guaranteed by Article 36:

> "[I]f he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner." *(Ibid.)*

2. As the Government of the United States stated in its Memorial in the case concerning *United States Diplomatic and Consular Staff in Tehran*:

> "a principal function of the consular officer is to provide varying kinds of assistance to nationals of the sending State, and for this reason the channel of communication between officers and nationals must at all times remain open. Indeed, such communication is so essential to the exercise of consular functions that its preclusion would render meaningless the entire establishment of consular relations. Article 36 establishes rights not only for the consular officer but, perhaps even more importantly, for the nationals of the sending State who are assured access to consular officers and through them to others." (*I.C.J. Pleadings*, p. 174 [references omitted].)

3. In 1992, the authorities of the Commonwealth of Virginia, one of the federated states comprising the United States, detained a Paraguayan citizen named Angel Francisco Breard. Without advising Mr. Breard of his right to consular assistance, or notifying Paraguayan consular officers of his detention, as required by the Vienna Convention, such authorities tried and convicted Mr. Breard and sentenced him to death.

4. Paraguay instituted this action by filing an Application and request for provisional measures on 3 April 1998. As Paraguay's Application explained, the United States' actions violated the obligations owed by the United States to Paraguay under the Vienna Convention. Paraguay therefore sought *restitutio in integrum*: the restoration of the situation that existed before the United States failed to provide the notifications and permit the consular assistance required by the Convention.

5. On 9 April 1998, the Court issued a provisional measures Order indicating that "[t]he United States should take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in these proceedings".

6. In spite of the Court's Order of provisional measures, United States authorities failed to take steps within their control to prevent the execution of Mr. Breard. They instead proceeded to execute Mr. Breard without ever having notified him of his right to consular assistance or provided Paraguay with any meaningful opportunity to exercise its rights under Articles 5 and 36 of the Vienna Convention.

7. The conduct of the United States in Mr. Breard's case, including its actions since 3 April 1998, violated the obligations owed by the United States to Paraguay under the Vienna Convention. The actions since 3 April 1998 also violated the obligation of the United States to comply with the Court's provisional measures Order. Finally, those actions have also violated the obligation owed by the United States to Paraguay under customary international law not to undertake any action that might prejudice any eventual decision in the case or aggravate the dispute.

8. As a result of these breaches, and in light of the impossibility of restoration of the *status quo ante*, Paraguay is entitled to a declaration of the United States' liability, an order of non-repetition of such acts, and reparation in the form of compensation and satisfaction.

I. THE FACTS

Municipal Court Proceedings concerning Mr. Breard

9. On 1 September 1992, law enforcement authorities of Virginia arrested Mr. Breard on suspicion of murder. Although aware of Mr. Breard's Paraguayan nationality, the authorities at no time informed Mr. Breard of his rights to consular assistance under Article 36, subparagraph 1 *(b)*, of the Vienna Convention. Nor did the authorities ever advise Paraguayan consular officers of Mr. Breard's detention. Unaware of, and not having been apprised of, these rights, Mr. Breard could not and did not exercise them before his trial.

10. Had Mr. Breard been properly informed of his rights under the Vienna Convention, he would have communicated with his Consul, seeking the assistance provided for in Article 36. In turn, Paraguay would have rendered that assistance.

11. The failure to provide the notification required by the Vienna Convention thus precluded Paraguay from protecting its interests in the United States as provided for in Articles 5 and 36 of the Vienna Convention. Among other things, Paraguay could not contact its national, assist in the defence of its national (as described in paragraphs 12 through 14 below), monitor the conditions of its national's detention, or ensure that international legal norms were respected in the treatment of, and proceedings against, its national.

12. The failure to provide the required notification also precluded Paraguay from protecting its national's interests in the United States as provided for in Articles 5 and 36 of the Vienna Convention. The authorities of Virginia effectively prevented Paraguayan consular officers from arranging for appropriate legal representation of Mr. Breard. Instead, the authorities themselves arranged for Mr. Breard to be represented by court-appointed counsel who were unfamiliar with Paraguayan culture and with the preconceptions concern-

ing the criminal justice system that a Paraguayan national might be expected to have.

13. As a result of the lack of consular assistance, Mr. Breard made a number of objectively unreasonable decisions during the criminal proceedings against him, which were conducted without translation. Most notably, he refused to accept the authorities' offer of life in prison in exchange for his pleading guilty to the crime. Instead, Mr. Breard insisted on risking a death sentence and confessing and denouncing his past criminal conduct at trial. Mr. Breard took these highly detrimental steps because — in the absence of advice from his consulate — he did not comprehend the fundamental differences between the criminal justice systems of the United States and Paraguay. Whereas Mr. Breard believed his confession and denunciation would invoke the mercy of the American court, as he understood they would a court in Paraguay, in reality these acts virtually assured Mr. Breard's conviction and resulted in his death sentence.

14. Consular assistance would have included advice on cultural and legal differences between Paraguay and the United States, including the desirability of accepting or rejecting plea offers in light of those differences; appropriate additional or other legal counsel; identifying and communicating with family members who could provide assistance and information; supplying records, documents, and other evidence helpful to Mr. Breard's defence; transport of family members and other witnesses to Virginia to provide testimony; attendance by consular officers at court or other proceedings; collecting and presenting mitigating evidence at the sentencing phase; and other forms of assistance both legal and non-legal. Such consular assistance would have affected the result of the criminal proceeding against Mr. Breard, including any sentence imposed.

15. On 24 June 1993, Mr. Breard was convicted of murder. On 22 August 1993, the trial court imposed a death sentence. Mr. Breard's direct appeals of the conviction and sentence were denied, as was his petition to the state courts for a writ of *habeas corpus*, a collateral proceeding seeking relief from unlawful detention.

16. In April 1996, Paraguay, without benefit of information from the authorities of Virginia and the United States, finally learned that Mr. Breard was imprisoned in the United States and awaiting execution. Immediately upon learning of his situation, Paraguay, through its embassy and consulate, began rendering assistance, both legal and otherwise, to Mr. Breard. Until contacted by the Paraguayan consular representatives at that time, Mr. Breard had been entirely unaware of his rights under the Vienna Convention.

17. On 30 August 1996, with the assistance of Paraguayan consular officers, Mr. Breard took the final step available to him for challenging his conviction and sentence by filing a petition to the federal court of first instance for a writ of *habeas corpus*. For the first time, Mr. Breard claimed violations of the Vienna Convention. That court rejected the assertion of this and other claims based on a municipal law doctrine of "procedural default" (*Breard* v. *Netherland*, 949 F. Supp. 1255 (E.D. Va. 1996)). Applying this doctrine, the court decided that, because Mr. Breard had not asserted his rights under the Vienna Convention in his previous legal proceedings, he could not assert them in the federal *habeas* proceeding. This municipal law doctrine was held to bar such relief even though, first, Mr. Breard was unaware of his rights under the Convention at the time of the earlier legal proceedings, and second, he was unaware of his rights precisely because the local authorities failed to comply with their obligations under the Convention promptly to inform him of those rights. The intermediate federal appellate court affirmed (*Breard* v. *Pruett*,

134 F. 3d 615 (4th Cir. 1998)). Mr. Breard's appeal to the intermediate federal appellate court was the last means of legal recourse in the United States available to him as of right.

18. In light of the federal appellate court's affirmance of the federal trial court's denial of Mr. Breard's *habeas* petition, the Virginia court that sentenced Mr. Breard set an execution date of 14 April 1998. The authorizing statute called for officials of Virginia on that date, absent an intervening court order, to "cause the prisoner under sentence of death to be electrocuted or injected with a lethal substance until he is dead" (*Va. Stat. Ann.* § 53.1-234).

19. By petition for a writ of *certiorari*, Mr. Breard requested that the United States Supreme Court exercise its discretionary authority to review the lower federal courts' decisions against him and grant a stay of his execution pending that review.

Paraguay's Efforts to Secure Relief in the United States

20. On 16 September 1996, the Republic of Paraguay filed its own civil lawsuit in a federal court of first instance against the municipal officials responsible for Mr. Breard's arrest, conviction, continuing imprisonment, and pending execution, alleging violations of the Vienna Convention. Paraguay sought, among other relief, an order vacating Mr. Breard's conviction, barring the municipal officials from taking any future actions based on that conviction, including refraining from putting Mr. Breard to death, and requiring those officials to afford Paraguay its rights under the Convention in any future proceedings should Virginia have sought, as Paraguay expected would be the case, to prosecute Mr. Breard anew.

21. Paraguay did not seek from the federal court of first instance any relief barring the competent authorities of the United States from enforcing its criminal law or, specifically, retrying Mr. Breard. Paraguay did contend, however, that the competent authorities of the United States were required to enforce the criminal law by means that comported with the obligations undertaken by the United States in the Vienna Convention.

22. On 27 November 1996, without having considered the merits of Paraguay's claim, the federal court of first instance held that it could not take jurisdiction of the case because it was barred by a municipal doctrine providing sovereign immunity to the several states that comprise the United States (*Paraguay* v. *Allen*, 949 F. Supp. 1269 (E.D. Va. 1996)). Paraguay appealed the decision, which was affirmed (*Paraguay* v. *Allen*, 134 F. 3d 622 (4th Cir. 1998)). During the appellate proceedings, the United States, through an *amicus curiae* brief, took the position that although the Vienna Convention is of great importance to United States nationals abroad, the issue of its own violation of the Convention was not justiciable in the courts of the United States in an action brought by another State party to the Convention.

23. Paraguay filed a petition for a writ of *certiorari* in the United States Supreme Court seeking review of the appellate decision.

24. In addition to its efforts to have its claim heard in the courts of the United States, Paraguay also engaged in diplomatic efforts to gain the assistance of the United States in remedying the effect of the breach of the Vienna Convention. In a letter dated 10 December 1996, the Ambassador of Paraguay sought the good offices of the United States Department of State,

> "in order that a new trial may be granted Paraguayan citizen Angel Breard within the framework of constitutional guarantees for proper defense

> against a criminal accusation as well as the strict fulfillment of the stipulations of international treaties covering acts of such nature."

In a response delivered 3 June 1997, the United States expressed disagreement with Paraguay's legal position and offered no assistance to Paraguay in exercising its rights under the Treaties. The United States confirmed this position in a letter dated 7 July 1997. Further attempts at a diplomatic resolution took place in the weeks before the date scheduled for Mr. Breard's execution.

This Court's Order of Provisional Measures

25. Because a petition for *certiorari* is a matter of the Supreme Court's discretion and is rarely granted, and because diplomatic efforts had been of no avail, Paraguay determined to seek redress in this Court.

26. On 3 April 1998, Paraguay filed in this Court its initial Application instituting proceedings. Together with that Application, Paraguay filed a request for provisional measures of protection.

27. On 7 April 1998, the Court held a hearing on the request for provisional measures at which both Paraguay and the United States presented oral argument.

28. Two days later, on 9 April 1998, the Court unanimously issued a provisional measures Order. In its Order, the Court found that the execution of Mr. Breard would render it impossible for the Court to order the relief that Paraguay was seeking and thus would cause irreparable harm to Paraguay's claimed rights. (Provisional measures Order, para. 37 [*I.C.J. Reports 1998*, p. 257].) The Court therefore ordered the United States to "take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in these proceedings" (*ibid.*, para. 41 (I)).

The United States' Execution of Mr. Breard in Defiance of the Provisional Measures Order and Paraguay's Rights under the Vienna Convention

29. On 9 April 1998, the United States transmitted a copy of the provisional measures Order to the United States Supreme Court.

30. On 10 April 1998, Mr. Breard supplemented his stay application then pending in the United States Supreme Court, citing this Court's Order as further grounds for a stay of execution. He also filed an original action for a writ of *habeas corpus* in the Supreme Court, also grounded in this Court's Order.

31. Also on 10 April 1998, Paraguay supplemented its stay application in front of the United States Supreme Court, citing this Court's Order as further grounds for a stay of or injunction against the execution. On 13 April 1998, Paraguay submitted to the Supreme Court and moved for leave to file an original action, based on the provisional measures Order and seeking emergency relief against the execution.

32. Also on 13 April 1998, Paraguay wrote a letter to the Solicitor General of the United States (who represents the United States before the Supreme Court) and the Legal Adviser to the United States Department of State (who represents the United States before this Court) calling upon the United States to take the necessary steps to comply with the Order.

33. In spite of this Court's Order that the United States take all available measures to stop the execution, the competent officials of the United States did not do so.

34. On 13 April 1998, Secretary of State Madeleine K. Albright wrote a letter to the Governor of Virginia. Secretary Albright discussed this Court's

Order and explained that the United States had opposed Paraguay's request for provisional measures. While Secretary Albright suggested that the Governor grant a reprieve of Mr. Breard's execution, she nevertheless characterized the Order as "non-binding".

35. Also on 13 April 1998, the Solicitor General of the United States, joined by the Agent of the United States in these proceedings, submitted a brief to the Supreme Court, opposing Mr. Breard's and Paraguay's requests that the Supreme Court give effect to this Court's provisional measures Order and arguing that the Order was not binding. Thus, rather than take affirmative measures to secure compliance with the Order, the Solicitor General and the Agent of the United States openly resisted its implementation. The Solicitor General and the Agent of the United States contended that Secretary Albright's letter was the only means of complying with the Order and that the Supreme Court should not grant Mr. Breard's or Paraguay's request for a stay.

36. Early the following morning, 14 April 1998, Paraguay submitted a brief to the Supreme Court in reply to the United States.

37. That evening, at approximately 8 p.m., the United States Supreme Court issued a summary decision denying all the petitions and requests for relief filed by Mr. Breard and by Paraguay (*Breard* v. *Greene*, 118 S. Ct. 1352 (1998)).

38. Later that evening, at approximately 10 p.m., the Governor of Virginia publicly announced that he had declined to grant a reprieve and ordered that the execution of Mr. Breard be carried out. Far from giving effect to the provisional measures Order, the Governor stated his intention to deny Paraguay any possibility of effective relief in this Court. He stated:

> "Should the International Court resolve this matter in Paraguay's favour, it would be difficult, having delayed the execution so that the International Court could consider the case, to then carry-out the jury's sentence despite the ruling [of] the International Court."

39. At approximately 10.35 p.m. on 14 April 1998, Virginia officials executed Mr. Breard by lethal injection.

II. THE JURISDICTION OF THE COURT

40. Under Article 36, paragraph 1, of the Statute of the Court, "[t]he jurisdiction of the Court comprises . . . all matters specially provided for . . . in treaties and conventions in force".

41. As Members of the United Nations, Paraguay and the United States are parties to this Court's Statute, to the Vienna Convention, and to its Optional Protocol Concerning the Compulsory Settlement of Disputes. In the Preamble to the Optional Protocol, the parties:

> "Express[] their wish to resort in all matters concerning them in respect of any dispute arising out of the interpretation or application of the Convention to the compulsory jurisdiction of the International Court of Justice."

42. Article I of the Optional Protocol then provides:

> "Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol."

43. Paraguay therefore submits that the matters in dispute between Paraguay and the United States as reflected in Paraguay's claims lie within the compulsory jurisdiction of the Court.

III. THE CLAIMS OF THE REPUBLIC OF PARAGUAY

44. The Government of the Republic of Paraguay claims that:

(a) Pursuant to Article 36, subparagraph 1 *(b)*, of the Vienna Convention, the United States was under the international legal obligation to Paraguay, a State Party to the Convention, to inform "without delay" any Paraguayan national, such as Mr. Breard, who is "arrested or committed to prison or to custody pending trial or is detained in any other manner" of his rights under that subparagraph. These rights include:

(i) the right, if the national arrested or detained so requests, to have the competent authorities of the receiving State inform the local consular post of the sending State that that State's national has been arrested or committed to prison or to custody pending trial or detained in any other manner;

(ii) the right to have the competent authorities of the receiving State forward any communication "addressed to the consular post from the person arrested, in prison, custody or detention . . . without delay".

The United States violated the foregoing obligations.

(b) Pursuant to Article 36, subparagraph 1 *(b)*, of the Vienna Convention, the United States was under the international legal obligation to a detained national of Paraguay, such as Mr. Breard, to inform him "without delay" of his rights under that subparagraph. These rights include:

(i) the right, if the national arrested or detained so requests, to have the competent authorities of the receiving State inform the local consular post of the sending State that that State's national has been so arrested or committed to prison or to custody pending trial or detained in any other manner;

(ii) the right to have the competent authorities of the receiving State forward any communication "addressed to the consular post from the person arrested, in prison, custody or detention . . . without delay".

The United States violated the foregoing obligations with respect to Mr. Breard.

(c) Pursuant to Article 36 of the Vienna Convention, the United States is under the international legal obligation to ensure that Paraguay can communicate with and provide consular assistance to a detained national prior to trial. Its failure to provide the notifications required by Article 36, subparagraph 1 *(b)*, of the Vienna Convention with respect to Mr. Breard effectively prevented Paraguay from exercising its right to carry out consular functions pursuant to Articles 5 and 36 of the Convention. The United States violated the foregoing obligation.

(d) Pursuant to Article 36, paragraph 2, of the Vienna Convention, the United States is under an international legal obligation to ensure that its municipal law and regulations enable full effect to be given to the purposes of the rights accorded under Article 36. The United States applied the municipal-

law doctrine of procedural default to bar Mr. Breard's efforts to obtain the benefit of Paraguayan consular assistance during and before a trial of the charges against him. Its application of municipal law failed to give full effect to the purposes for which the rights under Article 36 were intended. The United States thereby violated the foregoing obligation.

(e) Pursuant to customary international law, the United States may not derogate from its international legal obligation to uphold the Vienna Convention based upon its municipal law doctrines and rules, nor upon the basis that the acts in derogation are those of a subordinate organ or constituent or judicial power. By invoking and applying its municipal law of procedural default, the United States violated the foregoing obligation.

(f) Pursuant to 94 (1) of the United Nations Charter, Article 41 of this Court's Statute, and customary international law, the United States is under an international legal obligation to comply with this Court's Orders of provisional measures. By failing to take all available measures to prevent Mr. Breard's execution and by carrying out that execution on 14 April 1998, the United States failed to comply with this Court's 9 April 1998 Order of provisional measures. The United States violated the foregoing obligation, which was owed directly to Paraguay, as the State whose rights the Order expressly was intended to preserve.

(g) Pursuant to customary international law, the United States is under an international legal obligation to refrain from any action that might prejudice any eventual decision in a case or otherwise aggravate a pending dispute. Its execution of Mr. Breard interfered with the ability of this Court to grant fully effective relief in this action and seriously aggravated the dispute. The United States violated the foregoing obligation.

IV. THE JUDGMENT REQUESTED

45. *For these reasons*, the submissions of the Government of the Republic of Paraguay are as follows:

May it please the Court

(a) to adjudge and declare that the United States violated its international legal obligations to Paraguay, in its own right and in the exercise of its right of diplomatic protection of its national, under Articles 5 and 36 of the Vienna Convention, by arresting, detaining, trying, convicting, sentencing, and executing Angel Francisco Breard without providing Paraguayan consular officials the opportunity to provide effective assistance;

(b) to adjudge and declare that the United States violated its international legal obligation under Article 36 (2) of the Vienna Convention by applying the municipal-law doctrine of procedural default to bar Angel Francisco Breard from raising his claim under the Vienna Convention and thereby failing to give full effect in United States municipal law to the provisions of Article 36;

(c) to adjudge and declare that the United States violated its international legal obligation to comply with the provisional measures Order issued by this Court on 9 April 1998 by failing to take all measures at its disposal to ensure that Angel Francisco Breard was not executed; and

(d) to adjudge and declare that the United States violated its international legal obligation not to undertake any action that might prejudice any

eventual decision in the case or aggravate the dispute by failing to halt the execution of Angel Francisco Breard ;

and, in light of the foregoing violations,

(e) to adjudge and declare that the United States is under an international legal obligation to provide Paraguay a guarantee that the United States will not repeat its illegal acts, but will carry out in conformity with the foregoing international legal obligations, any future detention of or criminal proceedings against any Paraguayan national in its territory, whether by a constituent, legislative, executive, judicial, or other power, whether that power holds a superior or a subordinate position in the organization of the United States, and whether that power's functions are of an international or internal character ;

(f) to adjudge and declare that Paraguay was entitled to *restitutio in integrum* and would have been entitled to the restoration of the *status quo ante* had the United States not executed Mr. Breard ;

(g) to adjudge and declare that in light of the United States' actions rendering it impossible for the Court to provide the remedy of *restitutio in integrum*, Paraguay, in its own right and in the exercise of diplomatic protection of its national, is entitled to payment by the United States, in an amount to be determined by the Court in a subsequent proceeding, of (1) compensation, and (2) moral damages as satisfaction ;

(h) to adjudge and declare that, as a remedy for the United States' breach of the provisional measures Order and of its international legal obligation not to undertake any action that might prejudice any eventual decision in the case or aggravate the dispute, the Republic of Paraguay is entitled to payment by the United States, in an amount to be determined by the Court in a subsequent proceeding, of (1) compensation, and (2) moral damages as satisfaction.

V. JUDGE *AD HOC*

46. In accordance with the provisions of Article 31 of the Statute and Article 35, paragraph 1, of the Rules, the Republic of Paraguay declares its intention to exercise its right to name a judge *ad hoc*.

VI. RESERVATION OF RIGHTS

47. The Republic of Paraguay reserves the right to modify and extend the terms of this Application, as well as the grounds invoked.

The Hague, 9 October 1998.

(Signed) Manuel María CÁCERES,
Agent of the Republic of Paraguay.

CONDITIONAL REQUEST OF PARAGUAY FOR AN ORDER CONCLUSIVELY ESTABLISHING FACTS

DEMANDE CONDITIONNELLE DU PARAGUAY TENDANT À CE QUE LA COUR RENDE UNE ORDONNANCE QUI ÉTABLISSE DES FAITS DE FAÇON CONCLUANTE

On behalf of the Republic of Paraguay, I hereby submit a Conditional Request for an Order Conclusively Establishing Facts.

1. On 14 April 1998, in violation of this Court's Order of provisional measures of 9 April 1998, responsible officials of the United States executed Angel Francisco Breard. The execution deprived the Republic of Paraguay of a principal source of evidence in Paraguay's case : Mr. Breard himself.

2. As Paraguay more fully explains in its Memorial dated this date, there are no disputed issues of fact that it needs to establish in order to prevail on any of the claims it submits to this Court. The United States has candidly acknowledged its breach of the Vienna Convention on Consular Relations in Mr. Breard's case, and in Paraguay's view, as a matter of law, no prejudice need be shown in order to obtain a remedy for that breach. Further, even if the Court were to determine that a showing of prejudice were required on any of Paraguay's claims, the showing made by Paraguay from other sources would suffice to establish prejudice.

3. If the Court determines, however, that there remain any disputed issues of fact that are material to Paraguay's claims as to which Mr. Breard's testimony would have been relevant, it should deem those facts established in Paraguay's favour in order to remedy the evidentiary prejudice to Paraguay by virtue of the United States' execution of Mr. Breard.

BY EXECUTING MR. BREARD, THE UNITED STATES DEPRIVED PARAGUAY OF HIS TESTIMONY

4. For the reasons set forth in Chapter 5 of Paraguay's Memorial, the United States' execution of Mr. Breard breached a binding Order of this Court. Paraguay seeks appropriate reparation for that breach.

5. Separate and apart from that breach, the execution also violated the fundamental obligation owed by a party to a tribunal in which its case is pending not to interfere with the tribunal's capacity to reach a fully informed and fully effective judgment on the dispute submitted [1].

> "The function of a judicial tribunal, once an issue has been brought to it, is to take the necessary steps according to law towards reaching a decision in accordance with the principle of the equality of parties. This presupposes that the issue brought to it, once committed to the court, must as far as possible be preserved in that form, free of interference by unilateral action of a party, until the determination made by the court. It means also that the principle of equality cannot be disturbed by the superior force available to one party . . ." [2]

---

[1] E.g., *Electricity Company of Sofia and Bulgaria, Interim Measures of Protection, 1939, P.C.I.J., Series A/B, No. 79*, p. 199.

[2] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 13 September 1993, I.C.J. Reports 1993*, p. 376 (separate opinion of Judge Weeramantry). Cf. Ted L. Stein, "Contempt, Crisis, and the Court : The World Court and the Hostage Rescue Attempt", *American Journal of International Law*, Vol. 76, p. 509.

This duty of fidelity to the tribunal encompasses a duty to make relevant evidence available[1]. Contrary to that duty, the United States interfered with the Court's judicial processes by unilaterally taking action that makes certain evidence unavailable.

6. Whatever the character of the United States's obligations under the Order of provisional measures, it will remain the case that Paraguay will not have access to Mr. Breard's testimony because the United States chose to disregard that Order. For purposes of these proceedings, as between Paraguay and the United States, it should be the United States that suffers any adverse consequences from Mr. Breard's absence. Hence, however the Court may rule on Paraguay's claim for reparation arising from the breach of the Order, Paraguay is independently entitled to an order remedying any evidentiary prejudice it might suffer from the conduct that deprived it of Mr. Breard's testimony.

7. The case for such an order is especially compelling here because it is the United States that raises the only disputed issue as to which Mr. Breard's testimony might have been relevant. Specifically, at the hearing on provisional measures, the United States contended that Paraguay could not show prejudice to Mr. Breard from the admitted violation of the Vienna Convention, arguing that such prejudice was a prerequisite to relief for that violation[2]. As its Memorial reflects, Paraguay contends, to the contrary, that it is entitled to reparation as a matter of law and that therefore it need make no factual showing of prejudice in order to prevail on its Article 36 claims.

8. In the Order, the Court took note of the United States' contentions concerning prejudice and determined that "the issue of whether any such remedy is dependent upon evidence of prejudice to the accused in his trial and sentence can . . . only be decided upon at the merits"[3]. If the Court were to hold a showing of prejudice to be required, the injury to Paraguay's ability to pursue its claims under the Vienna Convention would ripen. In that event, Paraguay would be entitled to an appropriate order protecting it from any evidentiary prejudice.

IF THIS COURT HOLDS THAT PARAGUAY MUST SHOW PREJUDICE, IT SHOULD ALSO HOLD THAT PREJUDICE HAS BEEN CONCLUSIVELY ESTABLISHED

9. If this Court holds that Paraguay must make a factual showing of prejudice in order to prevail on its Vienna Convention claims, it should also hold that, for purposes of this proceeding, that fact should be deemed conclusively established. The Court would have authority to so order as a sanction for the violation of the Order or of the general duty owed by State litigants not to

---

[1] *Parker* case, US-Mexico Claims Comm'n, No. 127, 31 Mar. 1926, *Ops. of Comm'rs*, p. 40 (party has obligation to provide tribunal "all evidence within its possession to establish the truth, whatever it may be").

[2] See Oral Argument, case concerning *Vienna Convention on Consular Relations (Paraguay* v. *United States of America)*, Statement of Catherine Brown, para. 2.24 ; *ibid.* Statement of John R. Crook, paras. 3.30-3.31 ; *ibid.*, Statement of Michael J. Matheson, paras. 4.14 and 4.16.

[3] Case concerning *Vienna Convention on Consular Relations (Paraguay* v. *United States of America), Provisional Measures, Order of 9 April 1998, I.C.J. Reports 1998*, pp. 253, 254 and 256, paras. 18, 20, 32, 33.

interfere with the effective functioning of the judicial process[1]. But it would also have authority to enter such an order pursuant to its authority, both express and inherent, to conduct the proceeding in a fair and effective manner.

10. Under its Statute, the Court has authority to "make orders for the conduct of the case"[2]. It also has authority to "make all arrangements connected with the taking of evidence", to "call upon the agents to produce any document or to supply any explanations" and to take "[f]ormal note . . . of any refusal" to do so[3].

11. The Court also has authority to "frame rules for carrying out its functions"[4]. Pursuant to that authority, the Court has issued rules addressing the conduct of its hearings and the production and reception of evidence[5].

12. Even without these express provisions of the Statute and Rules, the Court, as a court of justice, would have authority to control the proceedings before it, including by determining proof of facts[6].

13. Hence, the Court has undoubted authority to determine the means by which it will determine disputed facts. This authority includes the authority to enter appropriate orders when a party deprives the Court of relevant evidence, either by refusing to provide it or, as here, preventing the adverse party from doing so[7]. For example :

> "In any case where evidence which would probably influence [the court's] decision is peculiarly within the knowledge of the claimant or of the respondent government, the failure to produce it, unexplained, may be taken into account by the [court] in reaching its decision."[8]

---

[1] Edvard Hambro, "The Binding Character of the Provisional Measures of Protection Indicated by the International Court of Justice", in *Rechtsfragen der Internationalen Organisation* (Walter Schätzel and Hans-Jürgen Schlochauer, eds. 1956), p. 170 (easing of burden of proof is a "natural and normal" result of violation of provisional measures order).

[2] I.C.J. Statute, Art. 48.

[3] I.C.J. Statute, Arts. 48, 49.

[4] I.C.J. Statute, Art. 30 (1).

[5] I.C.J. Rules of Court 1978, Arts. 54-72. See, e.g., Rules of Court, Art. 62 (authorizing Court to "call upon the parties to produce such evidence" as the Court may consider necessary).

[6] See Sir Gerald Fitzmaurice, "The Law and Procedure of the International Court of Justice, 1951-4 : Questions of Jurisdiction, Competence and Procedure", *1958 Brit. YB Int'l L.*, p. 117 and n. 1 (international tribunals inherently empowered "to prescribe the steps to be taken by the parties for the presentation of their respective cases ; . . . to rule on questions of the admissibility of evidence ; and to control the conduct of the proceedings generally") ; Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (1953), p. 266 ("Where a tribunal has jurisdiction in a particular matter, it is also competent with regard to all relevant incidental questions, subject to express provision to the contrary") ; see also *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 253 (the "Court possesses an inherent jurisdiction enabling it . . . to provide for the orderly settlement of all matters in dispute").

[7] See Sir Gerald Fitzmaurice, *op. cit.*, p. 151 (where a party refuses or fails to produce evidence called for pursuant to Article 49, "the sanction lies in the possibly adverse effect that this may have on the case of the party responsible") ; see also Gilbert Guillaume, "Preuves et mesures d'instruction", in *La juridiction internationale permanente : colloque de Lyon* (1987), p. 196 ("Compte tenu de ces difficultés, il est apparu nécessaire de donner tant aux parties qu'au juge une grande liberté de moyens pour la manifestation de la vérité" in cases where important evidence is in the opposing State's control).

[8] *Parker* case, US-Mexico Claims Comm'n, No. 127, 31 Mar. 1926, *Ops. of Comm'rs*, p. 40.

Thus, when a party fails to produce evidence in its control or, as in this case, renders such evidence impossible to obtain, a tribunal may order that the adverse party be deemed conclusively to have established the disputed fact [1].

14. Whether as a sanction for violating the Order or the customary law duty of fidelity to a judicial body, or as a matter of the Court's express and inherent authority to prevent prejudice to Paraguay resulting from the United States' execution of an important witness, the Court should enter an order protecting Paraguay from any evidentiary prejudice caused by Mr. Breard's execution.

RELIEF REQUESTED

15. *Wherefore*, Paraguay requests that

(a) if and to the extent that the Court determines that Paraguay must make a factual showing of prejudice as an element of its claims under the Vienna Convention on Consular Relations, the Court deem the fact of prejudice conclusively established ;

(b) if and to the extent that the Court determines that Paraguay has the burden to prove any other fact material to its claims as to which Mr. Breard's testimony would have been relevant, the Court deem such fact conclusively established ; and

(c) the Court provide such other and further relief as will fully protect Paraguay from any evidentiary prejudice it might incur as a result of Mr. Breard's execution.

The Hague, 9 October 1998.

(Signed) Manuel María CÁCERES,
Agent of the Republic of Paraguay.

---

[1] See, e.g., *Sedco, Inv.* v. *NIOC*, Iran-US Claims Tribunal, 2 July 1987, No. 129, para. 91 ; *INA Corp.* v. *Iran*, Iran-US Claims Tribunal, 12 Aug. 1985, No. 129, p. 382 ; see also *Nemazee* v. *Iran*, Iran-US Claims Tribunal, 10 Dec. 1996, No. 575-4-3, para. 62 (collecting cases).

MEMORIAL OF PARAGUAY

MÉMOIRE DU PARAGUAY

CHAPTER 1

INTRODUCTION

1.1 The Republic of Paraguay instituted proceedings in this Court in order to prevent the execution of a national who, the United States conceded, had been convicted and sentenced in violation of the provisions of the Vienna Convention on Consular Relations governing consular notification and access. After hearing the parties' submissions on Paraguay's Request for an Indication of Provisional Measures, the Court ordered the United States to take all measures at its disposal to halt the execution.

1.2 The United States chose not to do so. The federal Executive deferred to the Governor of Virginia and successfully urged the United States Supreme Court to do the same. Relying on the advice of the United States that the Order was not binding, the Governor went forward with the execution. In a press release issued on the night of the execution, the Governor stated that he had not granted a reprieve in order to eliminate the possibility that this Court's eventual judgment might prevent that execution.

1.3 As a result, the case returns to this Court in a fundamentally different posture than it had at the time Paraguay filed its Application. The United States' violation of the Order has rendered it impossible for the Court to grant Paraguay *restitutio in integrum* in the form of a new trial for Mr. Breard or, in the alternative, reconveyance of the plea offer. Paraguay must therefore seek other, infinitely less adequate forms of reparation.

1.4 In addition, the United States' violation of the Order gives rise to a distinct claim for breach of its obligations under the Vienna Convention. By that claim, Paraguay calls upon the Court to confirm the binding character of the obligation undertaken by a State Party that agrees to submit a dispute to this Court.

1.5 Thus, on the present submissions, Paraguay makes three claims. *First*, Paraguay claims that the United States breached Article 36(1) of the Vienna Convention by denying to both Paraguay and its national their rights of consular notification and access during the course of a criminal proceeding by which Mr. Breard was sentenced to death. Paraguay originally sought *restitutio in integrum* — that is, the restoration of the situation that existed prior to the breach. Given the impossibility of that remedy in light of the execution, Paraguay seeks a declaration and alternative forms of reparation.

1.6 The United States acknowledges the violation of Article 36(1), but contended at the provisional measures hearing that no prejudice to Mr. Breard could be established as a result of the breach of Paraguay's right to provide consular assistance. The United States' position is without merit. Under international law, no prejudice need be shown to engage the responsibility of a State that has breached a treaty obligation. In any event, the record before the Court abounds with evidence of grave prejudice to the rights of Paraguay and its national.

1.7 *Second*, Paraguay claims that the United States breached Article 36(2) of the Vienna Convention by applying the municipal-law doctrine of procedural default to prevent Mr. Breard from seeking relief from his conviction and sentence on the ground of the conceded violation. Specifically, the United States courts held that, because Mr. Breard had not raised his Vienna Convention claim during the course of his trial or post-conviction proceedings in state court, he could not raise the claim in his federal *habeas corpus* petition.

1.8 It is uncontested, however, that the reason that Mr. Breard did not raise a Vienna Convention claim prior to the federal *habeas* proceeding is that, because of the United States' breach, he had been unaware of his rights under the Convention prior to that time. Given that the very purpose of the consular notification provisions of Article 36(1) is to ensure that a detained national in the position of Mr. Breard is made aware of his right to contact his consul, the application of the procedural default doctrine to bar Mr. Breard from raising his claim violated Article 36(2). That Article requires municipal laws and regulations to be applied in a manner that allows "full effect" to be given to "the purposes for which the rights accorded under this Article are intended."

1.9 *Finally*, Paraguay claims that the United States breached a binding Order of this Court when it failed to take the steps necessary to stop the execution of Mr. Breard. The United States contends that, by virtue of restraints imposed by United States law, it could do nothing more to halt the execution than have the Secretary of State request the Governor of Virginia not to go forward. While that contention misstates the plenary power of the federal government in matters of foreign relations and international obligations, it is also wholly irrelevant as a matter of international law. The Governor of Virginia, a responsible official whose acts are attributable to the United States, had full control over whether to carry out the execution, and he determined that it should go forward despite the Court's Order.

1.10 In opposing Paraguay's application to the United States Supreme Court to enforce the Order, the United States advised that court that an indication of provisional measures under Article 41 of this Court's Statute is merely precatory. That position is wrong. Particularly when read in the context of the Statute of the Court, the terms employed, by their ordinary meaning, describe a binding order. The "power to indicate" measures that "ought to be taken" in order to "preserve the respective rights" of the parties can only be understood to carry a corresponding obligation of the parties to comply. Moreover, the object and purpose of Article 41 is to preserve the rights of the parties pending a binding final judgment, and that of the Statute as a whole is to provide for the binding, judicial resolution of disputes. These objects and purposes would be utterly frustrated if the parties retained a right to act prior to the final judgment in a manner that the Court has indicated will prevent it from rendering an effective judgment. Finally, the binding character of provisional measures under Article 41 is confirmed by the general rule that parties to a judicial proceeding must refrain from any step that might prejudice the court's capacity to provide relief. Simply put, the United States' undisputed obligation under Article 94(1) of the United Nations Charter to abide by a judgment of this Court that a new trial be granted Mr. Breard, or the plea offer be reconveyed, cannot be squared with the United States' suggestion that, in the meantime, it was free decisively to destroy the Court's capacity to provide that relief.

1.11 This Memorial has five further Chapters. In Chapter 2, Paraguay sets forth the facts underlying its three claims. In Chapter 3, it supplies the basis for this Court's jurisdiction over its claims under the Optional Protocol Concerning the Compulsory Settlement of Disputes to the Vienna Convention on Consular Relations, as well as under principles of inherent jurisdiction. In Chapter 4, it sets out its claims under Articles 36(1) and 36(2), respectively, of the Vienna Convention. In Chapter 5, it sets out its claim for breach of the Order of Provisional Measures. Finally, in Chapter 6, Paraguay prays for remedies of, first, several specified declarations; second, an order of non-repetition; and third, reparation in the form of both compensation and moral damages.

CHAPTER 2

FACTS

The Arrest and Failure of Notification

2.1 On 1 September 1992, officials of Arlington, Virginia, arrested Angel Francisco Breard on suspicion of murder and attempted rape. Arlington police officers searching Mr. Breard's apartment around the time of arrest found Mr. Breard's Paraguayan passport[1] and were aware that he was a Paraguayan national.[2] However, as the United States has advised this Court, the "'competent authorities'" who arrested Mr. Breard and placed him in custody "did not inform Breard that, as a national of Paraguay, he was entitled to have Paraguay's consul notified of his arrest."[3]

2.2 The competent authorities also did not inform the Paraguayan consular post for the district embracing Arlington,

---

[1] Affidavit of Armenia Guibi Vda. de Breard (26 Sept. 1998), para. 10, Annex 1.

[2] Stipulation, para. 2, *Breard v. Angelone* (E.D. Va. 1996) (No. 3:96CV366), Annex 2; *see also* United States Department of State, *Consular Notification and Access* (1998), pp. 1 & 4 (in the absence of other information, "all federal, state, or local officials who may, in the performance of their official functions, have contact with a foreign national in a situation triggering a requirement to notify the foreign national's consular officials" are to assume that a foreigner is a national of "the country on whose passport or other travel document the foreign national travels"), <http://www.state.gov/global/legal_affairs/ca_notification/ca_prelim.html>, Annex 3; *cf.* United States Department of State, *Foreign Affairs Manual*, 7 FAM § 413.1(a) (1984) (as to United States nationals, "possession of a passport satisfactorily establishes both the identity and the citizenship of the individual"), Annex 4.

[3] *Oral Argument, Vienna Convention on Consular Relations (Paraguay v. United States)*, para. 1.4 (statement of David R. Andrews), Annex 5; *see also* Stipulation, para. 2, *Breard v. Angelone* (E.D. Va. 1996) (No. 3:96CV366), Annex 2.

Virginia, of Mr. Breard's arrest.[4] Thus, they did not permit Paraguayan consular officials to avail themselves of their right to provide consular assistance to Mr. Breard upon his request.

The Plea Offer, Trial, Conviction, and Sentence

2.3 Following indictment, Virginia officials offered Mr. Breard a plea bargain in which the prosecution would seek only a life sentence if Mr. Breard would plead guilty.[5]

2.4 A "plea bargain" is an offer to a defendant by a prosecutor of a lesser sentence in return for the defendant's plea of guilty. Plea bargaining spares the public treasury the burden of a trial and the prosecutor the prospect of a failure to convict. The practice is commonplace in the criminal justice system of the United States.[6] Describing the practice as "an essential component of the administration of justice," the United States Supreme Court has encouraged its use.[7]

---

[4] *See* Affidavit of Jorge G. Prieto (27 Aug. 1996), para. 7, Annex 6; Affidavit of Ceferino Adrian Valdez Peralta (30 Sept. 1998), para. 4, Annex 7; Sra. Breard Aff., para. 7, Annex 1.

[5] *See* Petition for Writ of *Habeas Corpus*, *Breard v. Netherland* (E.D. Va. 1996) (No. 3:96CV366), para. 20 and p. 73 (verification by Angel Francisco Breard of facts set forth in petition), Annex 8; Affidavit of Robert L. Tomlinson II & Richard J. McCue (13 June 1995), para. 5, Annex 9; Sra. Breard Aff., para. 4, Annex 1.

[6] *See* United Nations, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Addendum: Mission to the United States*, document E/CN.4/1998/68/Add.3, para. 80.

[7] *Santobello v. New York*, 404 U.S. 257, 260 (1971).

2.5 Plea bargains are often offered in capital cases,[8] which are far more costly to prosecute to execution than cases seeking punishment of a term of imprisonment.[9] In the Commonwealth of Virginia, plea bargains were commonly offered in capital cases during the period that included Mr. Breard's arrest and trial, even when the alleged crime involved aggravated circumstances.[10]

2.6 By contrast, Paraguayan law does not permit plea bargaining.[11] Any such agreement between the accused and a prosecutor would be legally void and worthless in a Paraguayan court.[12] The principal means to obtain leniency in sentencing under Paraguayan law would be to confess to and denounce the criminal acts charged and appeal to the mercy of the court.[13]

2.7 Mr. Breard refused to authorize his appointed trial lawyers to accept the plea offer and advised them that he intended to confess the crime to the jury. Under Virginia law, a jury returning a guilty verdict (as it would necessarily do if the defendant confessed) could recommend one of only two sentences: life imprisonment or death.[14] Alarmed at this refusal, Mr. Breard's lawyers contemporaneously drafted a memorandum describing the case against him, his unwillingness to accept the plea offer, and their request that he reconsider that decision, and they then had Mr. Breard countersign the memorandum.[15]

---

[8] *See, e.g.*, Federal Death Penalty Resource Counsel Project, *Federal Death Penalty Prosecutions 1988-1998*, p. 1 (September 1, 1998) (listing 39 federal cases out of total of 116 brought to trial in which capital charges were dropped in exchange for guilty plea).

[9] *See* Spangenburg & Walsh, "Capital Punishment or Life Imprisonment? Some Cost Considerations," *Loyola L. Rev.*, Vol. 23 (1989), p. 45; International Committee of Jurists, *Administration of the Death Penalty in the United States* (1996), p. 120 n. 190 (estimating cost of death penalty trial and appeals at approximately US$3 million).

[10] Affidavit of William S. Geimer (18 Sept. 1998), para. 4, Annex 12.

[11] Affidavit of José Ignacio Gonzalez Macchi (24 Sept. 1998), para. 3, Annex 13.

[12] *Ibid.*

[13] *Ibid.*, para. 4.

2.8 Mr. Breard pleaded not guilty and faced trial in a Virginia state criminal court of first instance. The prosecution presented no witnesses to the alleged crimes and relied instead on physical and circumstantial evidence. At the close of the prosecution's evidence, Mr. Breard waived his right not to incriminate himself by his own testimony, took the witness stand, and confessed to the facts of the crimes charged, asserting that he was under a satanic curse placed upon him by his father-in-law at the time he committed the crime and that he was now acting as a witness to his new religious faith.[16] On 24 June 1993, the jury found Mr. Breard guilty.[17]

2.9 On 25 June 1993, during the penalty phase of its deliberations, the jury sent a note to the presiding judge asking how long a term of imprisonment Mr. Breard would serve prior to eligibility for early release if he were sentenced to life in prison.[18]

---

[14] Va. Stat. Ann. § 19.2-264.4, Annex 10.

[15] Memorandum from Richard J. McCue and Robert Lee Tomlinson II to Angel Breard (15 June 1993), Annex 11.

[16] *See* Petition for Writ of *Habeas Corpus*, paras. 21-22, *Breard v. Netherland* (E.D. Va. 1996) (No. 3:96CV366), Annex 8.

[17] *Ibid.*, para. 7.

[18] Petition for Writ of *Habeas Corpus Ad Subjiciendum*, para. 18, *Breard v. Angelone* (Arl. Cty. Cir. Ct. 28 Apr. 1995) (No. CL 95-526), Annex 14. In United States criminal law, an offender may under certain circumstances be granted a conditional release from imprisonment, referred to as "parole," which allows the offender to serve the remainder of the term outside prison, provided that he or she complies with the terms of the release.

The judge responded that he could not answer the jury's question.[19] The jury then sent out a note with a further question, asking whether they could recommend life in prison without possibility of early release.[20] After the judge declined to allow the jury to make that recommendation, the jury deliberated a further six hours before recommending a death sentence.[21] Under Virginia law, the court may not impose the death penalty unless the jury recommends it.[22]

2.10 On 22 August 1993, the trial court sentenced Mr. Breard to death.[23]

2.11 Mr. Breard's refusal of the plea offer against the advice of court-appointed counsel and his insistence on serving as a witness to his religious faith resulted from his lack of understanding of the significant cultural differences between the Paraguayan and United States legal systems.[24] He was, in particular, entirely unfamiliar with the practice of plea bargaining.[25] Mr. Breard neither understood nor trusted his court-appointed trial counsel.[26] Similarly, trial counsel could not understand or appreciate Mr. Breard's belief that leniency would result from his confession to the jury.

2.12 Had Mr. Breard known about his rights under the Vienna Convention, he would have exercised those rights by seeking the assistance of the Paraguayan consulate.[27] The Paraguayan consulate, which makes a practice of intervening in every case in which it is notified of the arrest of a Paraguayan national, would, if notified, have assisted Mr. Breard by explaining the differences between the legal systems of Paraguay and the United States.[28] In light of those differences, they would have advised Mr. Breard to accept the plea bargain that the Commonwealth's Attorney had offered on behalf of Virginia.[29] Had Mr. Breard been so advised by Paraguay's consul, he would have accepted the plea offer, avoided trial, and eliminated the prospect of receiving a capital sentence.[30]

---

[19] *Ibid.*

[20] *Ibid.*, para. 21.

[21] *Ibid.*, paras. 21, 23.

[22] Va. St. Ann. §19.2-264.4, Annex 10.

[23] *See* Petition for Writ of *Habeas Corpus*, para. 8, *Breard v. Netherland* (E.D. Va. 1996) (No. 3:96CV366), Annex 8.

[24] *See* Sra. Breard Aff., para. 4, Annex 1.

[25] *Ibid.*

[26] *Ibid.*, paras. 5-6; Affidavit of Alexander H. Slaughter (5 Oct. 1998), para. 4, Annex 15; Statement of Ricardo Caballero Aquino (1 Oct. 1998), para. 8, Annex 16.

Appellate and Habeas Proceedings in the Virginia Courts

2.13 Mr. Breard appealed his conviction and sentence to the Virginia Supreme Court, which affirmed, and the United States Supreme Court denied his petition to issue a discretionary writ of *certiorari* to review that judgment.[31]

2.14 Mr. Breard then filed a petition for a writ of *habeas corpus* in the Circuit Court of Arlington County. Among the claims Mr. Breard raised in his *habeas* petition was that his appointed counsel had not effectively assisted him in the criminal proceedings in the Virginia court.[32] To counter that claim, Virginia officials

---

[27] Caballero Stmt., paras. 9-10, Annex 16; Sra. Breard Aff., para. 9, Annex 1.

[28] Valdez Aff., paras. 5-6, Annex 7; Prieto Aff., para. 10, Annex 6.

[29] Valdez Aff., para. 8, Annex 7.

[30] Sra. Breard Aff., para. 9, Annex 1; Caballero Stmt., para. 10, Annex 16.

[31] *Breard v. Commonwealth*, 248 Va. 68, 445 S.E.2d 670 (1994); *Breard v. Virginia*, 513 U.S. 971, 115 S. Ct. 442 (1994) (mem.).

[32] Petition for Writ of *Habeas Corpus Ad Subjiciendum*, para. 192 *et seq.*,

(continued...)

procured from Mr. Breard's trial counsel an affidavit swearing that, among other things, they had secured for Mr. Breard a clear offer from the prosecutor that he would receive a penalty of life in prison in exchange for a confession to the crimes charged.[33] Virginia officials relied on this affidavit in successfully moving the Arlington County Circuit Court to dismiss Mr. Breard's petition.[34] That dismissal was affirmed by the Virginia appellate court.[35]

2.15 Throughout these proceedings, Mr. Breard remained uninformed of his right to consult the Paraguayan consul, and no Paraguayan official participated therein.

Mr. Breard's Habeas Proceeding in the Federal Courts

2.16 In April 1996, Paraguayan officials learned for the first time of Mr. Breard's imprisonment and impending execution in the United States and immediately began rendering legal and other assistance to Mr. Breard.[36] On 30 August 1996, with the assistance of Paraguayan consular officials and new, court-appointed legal counsel, Mr. Breard took the final step available to him for challenging his conviction and filed a petition for writ of *habeas corpus* in the United States District Court for the Eastern District of

---

32. (...continued)
Breard v. Angelone (Arl. Cty. Cir. Ct. 28 Apr. 1995) (No. CL 95-526), Annex 14.

[33] *See* Tomlinson/McCue Aff., para. 5, Annex 9.

[34] Motion to Dismiss, p. 11, *Breard v. Angelone* (Arl. Cty. Cir. Ct. 14 June 1995) (No. CL 95-526), Annex 17.

[35] Petition for *Writ of Habeas Corpus*, para. 11, *Breard v. Netherland* (E.D. Va. 1996) (No. 3:96CV366), Annex 8.

[36] Caballero Stmt., para. 3, Annex 16; Valdez Aff., para. 4, Annex 7.

Virginia, a federal court of first instance.[37] Having finally been apprised of his rights under the Vienna Convention, Mr. Breard claimed for the first time that Virginia officials had violated those rights and sought relief from his conviction and sentence on that ground, among others.[38]

2.17 Upon the involvement of Paraguayan consular officials in his federal *habeas corpus* proceedings, Mr. Breard began to cooperate in his own defense.[39] Paraguayan consular officials understood Mr. Breard's cultural perspective, explained his choices in the United States legal system in a way that he could understand, and fostered trust that had previously been lacking between Mr. Breard and his lawyers.[40]

Paraguay's Action in the Federal Courts

2.18 On 16 September 1996, the Republic of Paraguay filed a civil action in the United States District Court for the Eastern District of Virginia, alleging violations of its own rights under both the Vienna Convention and a treaty of friendship, commerce, and navigation between Paraguay and the United States.[41] Paraguay sought, among other relief, *vacatur* of Mr. Breard's conviction and sentence and an order that any future proceedings against Mr. Breard be conducted in accordance with the terms of the Vienna Convention.[42]

---

[37] Petition for Writ of Habeas Corpus, *Breard v. Netherland* (E.D. Va. 1996) (No. 3:96CV366), Annex 8.

[38] *Ibid.*, paras. 23-60.

[39] *See* Caballero Stmt., paras. 6-10, Annex 16; Slaughter Aff., para. 4, Annex 14.

[40] *Ibid.*

[41] *Paraguay v. Allen*, 949 F. Supp. 1269, 1271-1272 (E.D. Va. 1996).

Judgments of the District Court and the Court of Appeals in the Habeas Proceeding and Paraguay's Action

2.19 On 27 November 1996, the federal district court rejected Mr. Breard's claim under the Vienna Convention. Relying on a municipal law doctrine of "procedural default," the court held that, because Mr. Breard had not raised a claim under the Vienna Convention in his state proceedings, he could not raise the claim in the federal *habeas* proceeding.[43] On 22 January 1998, the United States Court of Appeals for the Fourth Circuit (the intermediate federal appellate court) affirmed the judgment.[44]

2.20 On 27 November 1996, the federal district court also dismissed Paraguay's complaint. The court held that because Virginia officials were by then permitting Paraguayan consular officials access to Mr. Breard, the injunction Paraguay sought against the execution was the kind of retrospective relief that a federal court did not have jurisdiction to order against state officials.[45] On 22 January 1998, the same day it rendered its judgment in Mr. Breard's *habeas* proceeding, the Court of Appeals also affirmed in Paraguay's case.[46]

2.21 Taken together, the judgments of the Court of Appeals meant that, while it was Virginia officials who had violated the Convention by failing to provide the required notice, at the time Mr. Breard learned of his right and Paraguay learned of his detention it was already too late for either of these intended beneficiaries of the required notice to raise the claim in the United States courts.

---

[42] *Ibid.*, p. 1272.

[43] *Breard v. Netherland*, 949 F. Supp. 1255, 1263 (E.D. Va. 1996), Annex 18.

[44] *Breard v. Pruett*, 134 F.3d 615 (4th Cir. 1998), Annex 19.

[45] *Paraguay v. Allen*, 949 F. Supp. 1269 (E.D. Va. 1996).

[46] *Paraguay v. Allen*, 134 F.3d 622 (4th Cir. 1998).

Setting of the Execution Date and Commencement of Proceedings in the United States Supreme Court

2.22 On 24 February 1998, Paraguay filed a petition for writ of *certiorari* in the United States Supreme Court to review the judgment of the Court of Appeals.[47]

2.23 On 25 February 1998, the Virginia court that had sentenced Mr. Breard set an execution date of 14 April 1998.[48]

2.24 On 11 March 1998, Mr. Breard also filed a *certiorari* petition in the Supreme Court.[49]

2.25 On 23 March 1998, Mr. Breard applied to the Court of Appeals for a stay of his execution, and on 30 March 1998, filed a similar application to the Supreme Court.[50] On 24 March 1998, Paraguay applied to the Court of Appeals for a stay of or injunction against Mr. Breard's execution, and on 1 April 1998, filed a similar application to the Supreme Court.[51]

---

[47] Petition for Writ of Certiorari, *Paraguay v. Gilmore*, __ U.S. __, 118 S. Ct. 1352 (24 Feb. 1998) (Nos. CR 92-1467, 1664-1668) (No. 97-1390).

[48] Order, *Commonwealth v. Breard* (Arl. Cty. Cir. Ct. 25 Feb. 1998) (Nos. CR 92-1467, 1664-1668).

[49] Petition for Writ of Certiorari, *Breard v. Greene*, __ U.S. __, 118 S. Ct. 1352 (11 Mar. 1998) (No. 97-8214).

[50] Application for Stay of Execution, *Breard v. Greene*, 134 F.3d 615 (4th Cir. 23 Mar. 1998) (No. 96-25); Application for Stay of Execution, *Breard v. Greene*, __ U.S. __, 118 S. Ct. 1352 (30 Mar. 1998) (No. 97-8214).

[51] Application for Stay of or Injunction Against Execution Pending

(continued...)

Diplomatic Negotiations

2.26 In addition to pursuing its claim in the courts of the United States, Paraguay also engaged in diplomatic discussions in an attempt to gain the assistance of the United States in remedying the breach of the Vienna Convention and the treaty of friendship, navigation, and commerce.

2.27 By letter dated 10 December 1996, the Ambassador of Paraguay sought the good offices of the United States Department of State "in order that a new trial may be granted Paraguayan citizen Angel Breard within the framework of constitutional guarantees for proper defense against a criminal accusation as well as the strict fulfillment of the stipulations of international treaties covering acts of such nature."[52]

2.28 Having received no response, Paraguay repeated its request in a letter dated 3 June 1997, the day before oral argument in the Court of Appeals.[53]

2.29 In a response bearing the same date, the United States Department of State expressed disagreement with Paraguay's legal position and offered no assistance to Paraguay in exercising its rights

---

51. (...continued)
Disposition of Petition for Writ of Certiorari, *Paraguay v. Gilmore*, 134 F.3d 622 (4th Cir. 24 Mar. 1998) (No. 96-2770); Application for Stay of or Injunction Against Execution Pending Disposition of Petition for Writ of Certiorari, *Paraguay v. Gilmore*, __ U.S. __, 118 S. Ct. 1352 (1 Apr. 1998) (Nos. 97-1390, A-738).

[52] Letter from His Excellency Jorge J. Prieto, Ambassador of Paraguay, to His Excellency Jeffrey Davidow, Assistant Secretary of State for Inter-American Affairs, United States Department of State (10 Dec. 1996).

[53] Letter from His Excellency Jorge J. Prieto, Ambassador of Paraguay, to His Excellency Jeffrey Davidow, Assistant Secretary of State for Inter-American Affairs, United States Department of State (3 June 1997).

under the treaties.[54] The United States confirmed this position in a letter dated 7 July 1997.[55]

2.30 During the week prior to instituting proceedings in this Court, the Government of Paraguay engaged in further diplomatic discussions with the Government of the United States and forbore from instituting proceedings in consideration of those discussions. The diplomatic negotiations failed when the United States declined to provide Paraguay assurances that it would stop Mr. Breard's execution.[56]

Paraguay's Application to the Court and Request for Provisional Measures of Protection

2.31 On 3 April 1998, Paraguay filed in this Court its Application Instituting Proceedings and a Request for Provisional Measures of Protection. On 7 April 1998, the Court held a hearing on Paraguay's Request.

2.32 On 9 April 1998, two days after the hearing, the Court issued a unanimous Order.[57] The Court stated that although it "will not order interim measures in the absence of 'irreparable prejudice

---

[54] Letter from James H. Thessin, Deputy Legal Adviser, United States Department of State, to His Excellency Jorge J. Prieto, Ambassador of Paraguay (3 June 1997).

[55] Letter from James H. Thessin, Deputy Legal Adviser, United States Department of State, to His Excellency Jorge J. Prieto, Ambassador of Paraguay (7 July 1997).

[56] *See Oral Argument, Case Concerning Vienna Convention on Consular Relations (Paraguay v. United States), Provisional Measures*, para. 2.26 (statement of Catherine Brown); *ibid.*, para. 4.19, (statement of Michael J. Matheson), Annex 5.

[57] *Vienna Convention on Consular Relations, (Paraguay v. United States), Provisional Measures, Order of 9 April 1998.*

. . . to rights which are the subject under dispute.'"[58] the execution of Mr. Breard as scheduled "would render it impossible for the Court to order the relief that Paraguay seeks and thus cause irreparable harm to the rights it claims."[59] Accordingly, the Court issued an order that the United States "take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in these proceedings . . . ."[60]

2.33 In the Order on the Request, the Court also stated that it would take steps to "to ensure that any decision on the merits be reached with all possible expedition." Consistent with that objective, the Court issued a separate Order on the same day setting an expedited schedule for written submissions.[61]

Response of the United States to the Provisional Measures Order

2.34 By letter dated Sunday, 5 April 1998, and submitted the next day, Paraguay advised the United States Supreme Court of its filing in this Court and of the hearing scheduled for 7 April.[62] On 8 April, the Supreme Court issued an order requesting the United States to submit its views on the petitions for *certiorari* filed by Mr. Breard and Paraguay by 17.00 hours, 13 April, the day before the

---

58. *Ibid.*, para. 36 (citations omitted) (ellipsis in original).

59. *Ibid.*, para. 37.

60. *Ibid.*, para. 41(I).

61. *Vienna Convention on Consular Relations, (Paraguay v. United States), Time Limits, Order of 9 April 1998.*

62. Letter from Donald Francis Donovan, Counsel for the Republic of Paraguay, to William K. Suter, Clerk, Supreme Court of the United States (5 Apr. 1998).

execution was scheduled to be carried out.[63] On 9 April, the day of the Order, the United States submitted a copy to the Supreme Court.[64]

2.35 On 10 April 1998, Mr. Breard filed an original petition to the Supreme Court for a writ of *habeas corpus* and a supplemental application for a stay of execution, both based on this Court's Order from the previous day.[65]

2.36 On the same day, Paraguay also submitted a supplemental application for a stay of or injunction against the execution on the additional ground of this Court's Order, urging the Court to give effect to the Order as a matter of treaty obligation and comity.[66]

2.37 On Monday, 13 April 1998, Paraguay moved the Supreme Court for leave to file an original action requesting the Court to enjoin the execution on the ground of this Court's Order, reiterating that it should enforce the Order as a matter of treaty obligation and comity.[67]

2.38 Also on that day, Paraguay wrote to the Solicitor General of the United States (who represents the United States before the Supreme Court) and the Legal Advisor to the Department of State (who, as Agent, represents the United States before this Court) to call on the United States to fulfill its obligations pursuant to the Provisional Measures Order.[68]

---

[63] Order, *In re Angel Francisco Breard*, __ U.S. __, 118 S. Ct. 1352 (8 Apr. 1998) (Nos. 97-8214, A-732).

[64] Letter from Seth P. Waxman, Solicitor General, Department of Justice, to William K. Suter, Clerk, Supreme Court of the United States (9 Apr. 1998).

[65] *In re Angel Francisco Breard*, __ U.S. __, 118 S. Ct. 1352 (10 Apr. 1998) (Nos. 97-8660, A-767); Supplemental Brief in Support of Application for a Stay of Execution, *Breard v. Greene*, __ U.S. __, 118 S. Ct. 1352 (10 Apr. 1998) (No. 97-8214).

[66] Supplemental Application for Stay of or Injunction Against Execution, *Paraguay v. Gilmore*, __ U.S. __, 118 S. Ct. 1352 (10 Apr. 1998) (Nos. 97-1390, A-738).

[67] *Paraguay v. Gilmore*, __ U.S. __, 118 S. Ct. 1352 (1998) (Nos. 125 Orig., A-771).

2.39 Later that day, at or about 17.00 hours, the United States took two separate but coordinated actions in response to the Provisional Measures Order.[69]

2.40 In response to the Supreme Court's invitation to the United States to express its views, the Solicitor General of the United States, joined by the Legal Advisor, submitted a brief to the Supreme Court arguing that this Court's Order was "precatory rather than mandatory" and urging the court to deny each of Mr. Breard's and Paraguay's pending requests for relief from the execution.[70] The United States advised the court that, while "[t]his case . . . does not raise any questions concerning the ability of the United States to sue in order to enforce compliance with the Vienna Convention,"[71] the means available to stop the execution "include[d] only persuasion [of the Governor of Virginia] and not legal compulsion through the judicial system."[72]

---

[68] Letter from Donald Francis Donovan, Counsel to the Republic of Paraguay, to Seth P. Waxman, Solicitor General, United States Department of Justice, and David R. Andrews, Legal Advisor, United States Department of State (13 Apr. 1998), Annex 20.

[69] *See* State Department Regular Briefing, 15 Apr. 1998, *available in* LEXIS, Executive Branch Library, Federal News Service File (James Rubin, briefer) ("For those of you who seemed to have misunderstood this, the United States acted as one. The Department of Justice brief before the Supreme Court was signed by the legal advisor of the State Department . . . . There is no disagreement between the State Department and the Justice Department.").

[70] *See* Brief for the United States as *Amicus Curiae*, p. 51, *Breard v. Greene*, __ U.S. __, 118 S. Ct. 1352 (1998), Annex 21.

[71] *Ibid.*, p. 15 n. 3 (citing *United States v. Arlington County*, 669 F.2d 925 (4th Cir.), *cert. denied*, 459 U.S. 801 (1982)).

2.41 At the same time, Secretary of State Madeleine K. Albright wrote a letter to the Governor of the Commonwealth of Virginia, James S. Gilmore III. The letter advised the Governor that this Court's Order was "non-binding," but requested that the Governor grant a reprieve of Mr. Breard's execution.[73] The Secretary's letter was appended to the brief of the United States to the Supreme Court.[74]

2.42 On 14 April 1998, at approximately 03.00 hours, Paraguay submitted a reply to the Solicitor General's brief, again urging the Supreme Court to give effect to the Provisional Measures Order.[75]

2.43 At approximately 20.00 hours, the Supreme Court issued a *per curiam* decision denying all the pending requests for relief.[76]

---

[72] *Ibid.*, p. 51. *See also* State Department Regular Briefing, 15 Apr. 1998, *available in* LEXIS, Executive Branch Library, Federal News Service File (James Rubin, briefer) ("Well, we believe we did take the [International Court of Justice's] request seriously, and we believe we found the right balance between making the case before the Supreme Court that there was no requirement to stay the execution and [Secretary of State Albright's] writing this letter to the governor requesting such a stay of execution.").

[73] Letter from Madeleine K. Albright, Secretary of State of the United States, to James S. Gilmore III, Governor, Commonwealth of Virginia (13 Apr. 1998), Annex 22.

[74] *See* Brief for the United States as *Amicus Curiae*, *op. cit.*

[75] Reply to the Brief for the United States as Amicus Curiae, *Paraguay v. Gilmore*, __ U.S. __, 118 S. Ct. 1352 (14 Apr. 1998) (Nos. 97-1390, A-738).

[76] *Breard v. Greene*, __ U.S. __, 118 S. Ct. 1352 (1998), Annex 23.

2.44 Immediately upon learning of the decision, Mr. Breard and Paraguay each filed a new complaint in the United States District Court for the Eastern District of Virginia asking that the court give effect to the Provisional Measures Order; each also sought emergency relief to stay or enjoin the then-imminent execution.[77] At about 21.00 hours, after a brief contested hearing, the district court denied relief.

2.45 Both Paraguay and Breard took emergency appeals to the United States Court of Appeals for the Fourth Circuit, which affirmed the district court's denials of relief.

2.46 Shortly after 22.00 hours, the Governor announced that he would not grant a reprieve.[78] He first explained that "[t]he U.S. Department of Justice, together with the Virginia Attorney General, [made] a compelling case that the International Court of Justice [had] no authority to interfere" with Virginia's criminal justice system. As a further reason for refusing a reprieve, the Governor stated that, "[s]hould the International Court resolve this matter in Paraguay's favor, it would be difficult, having delayed the execution so that the International Court could consider the case, to then carry-out the jury's sentence despite the ruling [of] the International Court."[79]

2.47 Mr. Breard's execution by lethal injection was commenced at approximately 22.30 and completed at approximately 22.39 hours.[80]

---

77. Complaint, *Breard v. Reno* (E.D. Va. 14 Apr. 1998) (No. 3:98CV226); Complaint, *Paraguay v. Gilmore* (E.D. Va. 14 Apr. 1998) (No. 3:98CV227), *voluntarily dism'd without prejudice* (27 Apr. 1998).

78. Statement by Governor Jim Gilmore Concerning the Execution of Angel Breard (14 Apr. 1998), Annex 24.

79. *Ibid.*

80. Affidavit of Nancy Huerta (5 Oct. 1998), paras. 11-12, Annex 25.

Post-Execution Letters

2.48 The Provisional Measures Order required the United States to "inform the Court of all Measures which it has taken in implementation of this Order."[81]

2.49 On 15 April 1998, the day after the execution, the United States transmitted a letter to this Court advising the Court of that fact. The United States further advised that it had taken the Order "seriously into account" and had taken "all measures lawfully at its disposal" to comply with the Court's Order.[82]

2.50 By letter dated 28 April 1998, Paraguay took issue with that assertion.[83]

---

[81] *Case Concerning the Vienna Convention on Consular Relation. (Paraguay v. United States), Provisional Measures, Order of 9 April 1998*, para. 41(II).

[82] Letter from David R. Andrews, Agent of the United States of America, to His Excellency Eduardo Valencia-Ospina, Registrar, International Court of Justice (15 Apr. 1998) (citation and internal quotation marks omitted), Annex 26.

[83] Letter from His Excellency Manuel Maria Cáceres, Agent of Paraguay, to His Excellency Eduardo Valencia-Ospina, Registrar, International Court of Justice (28 Apr. 1998), Annex 27.

CHAPTER 3

THE COURT HAS JURISDICTION OVER PARAGUAY'S CLAIMS

3.1 At the hearing on Paraguay's request for provisional measures, the United States challenged the Court's jurisdiction to hear Paraguay's claims. Article 36(6) of the Statute provides that "[i]n the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court." The Court has also held that, even apart from Article 36(6), "[t]he judicial character of the Court and rule[s] of general international law . . . are sufficient to establish that the Court is competent to adjudicate on its own jurisdiction . . . ."[84]

3.2 The Court is plainly competent, therefore, to determine its jurisdiction to hear Paraguay's claims. It is also plainly competent to hear each of Paraguay's claims.

I.

The Optional Protocol Gives this Court Jurisdiction over Any Dispute Arising out of the Application or Interpretation of the Convention

3.3 Paraguay and the United States are both members of the United Nations and, therefore, parties to the Statute of this Court.[85] The Statute gives this Court "jurisdiction . . . [in] all matters specifically provided for . . . in treaties and conventions in force."[86]

---

[84] *Nottebohm, Preliminary Objection, Judgment, I.C.J. Reports 1953*, p. 120.

[85] U.N. Charter, art. 93.

[86] I.C.J. Statute, art. 36(1).

3.4 Paraguay and the United States are also parties to the Optional Protocol Concerning the Compulsory Settlement of Disputes to the Vienna Convention on Consular Relations (the "Optional Protocol").[87] In the preamble to the Optional Protocol, emphasis supplied, the States Parties

> [e]xpress[ed] their wish to resort in *all matters* concerning them *in respect of any* dispute *arising out of* the interpretation or application of the Convention to the compulsory jurisdiction of the International Court of Justice, unless some other form of settlement has been agreed upon by the parties within a reasonable period . . . .

Accordingly, by Article I, emphasis supplied, they agreed that

> [d]isputes *arising out of* the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol . . . .

3.5 The Court need look no further than the ordinary meaning of the text of the Optional Protocol, including its preamble, to determine the scope of its jurisdiction. As the United States has previously advised the Court, Article I of the Optional Protocol is a "model compromissory clause, providing . . . in the clearest manner for the compulsory jurisdiction of the Court over *any* dispute *arising out of* the interpretation or application of the Vienna Convention[] . . . ."[88] "The clarity and precision of Article I" leave no doubt of the broad scope of disputes that the parties intended to bring within the jurisdiction of this Court: "any dispute" arising from the Convention.[89]

---

[87] Optional Protocol Concerning the Compulsory Settlement of Disputes, accompanying the Vienna Convention on Consular Relations, 24 April 1963, 596 U.N.T.S. 261, 21 U.S.T. 77.

[88] *Memorial of the United States, United States Diplomatic and Consular Staff in Tehran, I.C.J. Pleadings 1980*, p. 142 (internal quotations omitted) (emphasis added); *see ibid.*, pp. 142-44.

II.

The Court Has Jurisdiction Over the Dispute Arising From the United States' Breach of Article 36(1)

3.6 Paraguay's first claim is that the United States violated the Vienna Convention by failing to provide its national Angel Francisco Breard the notification required by Article 36(1). It would be hard to state a claim that more squarely "aris[es] out of the interpretation or application of the Convention."

3.7 Nevertheless, at the hearing on provisional measures, the United States contended that, because it had conceded that it had breached its obligation to Paraguay under Article 36(1) in the case of Mr. Breard, Paraguay's Application raised no "dispute" within the meaning of the Optional Protocol.

3.8 In the *Tehran Hostages Case*, the United States addressed, and peremptorily dismissed, a virtually identical argument. There, the United States anticipated the argument that because Iran's conduct so manifestly lacked legal justification, there was no dispute for the Court to resolve.[90]

3.9 The United States characterized such an argument as "specious." The United States explained that

> the sum and substance of every case brought to the Court under the compromissory clause of a treaty is the claim that the Respondent's conduct violates its obligations under that treaty. It would be anomalous to hold that the Court has jurisdiction where there is

---

[89] *Ibid.*, p. 142 n. 2.

[90] *Oral Argument, United States Diplomatic and Consular Staff in Tehran, I.C.J. Pleadings 1980*, p. 279 (statement of Stephen M. Schwebel).

> an arguable claim that a treaty has been violated but lacks jurisdiction where there is a manifestly well-founded claim that the same treaty has been violated. Such a contention has no support in the jurisprudence or traditions of this Court, or in the terms of the Optional Protocols. Indeed, any such rule would provide an incentive for States to flout their treaty obligations and to avoid offering any justification for their conduct in order to defeat the Court's jurisdiction.[91]

Equally here, the United States' candid concession that Paraguay's rights under Article 36(1) have been violated cannot defeat the jurisdiction to which the United States has consented.

3.10 Moreover, the United States' concession plainly cannot defeat the Court's jurisdiction where, as here, there remains a fundamental dispute over the remedy owed. A dispute is "a disagreement on a point of law or fact, a conflict of legal views or interests between parties."[92] As the hearing on provisional measures demonstrated, the parties here disagree about, among other things, (a) whether the Vienna Convention affords a remedy in the nature of *vacatur* of a criminal conviction; (b) whether prejudice is a prerequisite to any such remedy; (c) whether the remedies available for a violation of the Convention must be found within the four corners of the Convention itself, as the United States has asserted, or can instead be identified by resort to general principles of state responsibility and remedies; and (d) whether Paraguay is entitled to any remedy beyond the bare expression of regret relied upon by the United States.

---

[91] *Ibid.*

[92] *East Timor, Judgment, I.C.J. Reports 1995*, p. 99; *see also Northern Cameroons, Judgment, I.C.J. Reports 1963*, p. 27; *Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 11; *see also* I.C.J. Statute, art. 36(2) (listing among acceptable disputes for the Court those concerning "the nature or extent of the reparation to be made for the breach of an international obligation").

3.11 At a minimum, "there exists a dispute as to whether the relief sought by Paraguay is a remedy available under the Vienna Convention, in particular in relation to Articles 5 and 36 thereof."[93] This Court has jurisdiction over that dispute.

III.

The Court Has Jurisdiction Over the Dispute Arising From the United States' Breach of Article 36(2)

3.12 Paraguay's second claim is that the United States violated Article 36(2) of the Convention by applying a municipal-law doctrine of procedural default to bar Mr. Breard from raising a claim under the Vienna Convention after he learned that he had been deprived of his rights to consular notification and access under the Convention. According to Paraguay, application of the doctrine in these circumstances violates the command of Article 36(2) that "the laws and regulations of the receiving State . . . must enable full effect to be given to the purposes for which the rights accorded under [Article 36] are intended."

3.13 The federal courts of the United States applied the doctrine of procedural default to bar Mr. Breard's claim.[94] The United States advised the Supreme Court that the doctrine applied.[95] Thus, there is a dispute between the parties over the application of that doctrine in light of Article 36(2).

3.14 Because this claim, too, arises out of the interpretation and application of the Convention, the Court has jurisdiction to hear it.

---

[93] *Vienna Convention on Consular Relations (Paraguay v. United States of America), Provisional Measures, Order of 9 April 1998*, para. 31.

[94] *Breard v. Greene*, __ U.S. __, 118 S. Ct. 1352, 1354-55 (1998) (*per curiam*).

[95] Brief of the United States as *Amicus Curiae*, pp. 37-38, 41-45, *Breard v. Greene*, __ U.S. __ , 118 S. Ct. 1352 (1998).

IV.

The Court Has Jurisdiction Over the Dispute Arising From the United States' Breach of the Provisional Measures Order

3.15 Paraguay's third claim is that the United States has violated the Order of Provisional Measures.

3.16 In its brief of 13 April 1998 to the United States Supreme Court, the United States contended that the Order was merely precatory. In its letter of 15 April 1998 to this Court, the United States contended that because, in its view, it had taken the Order seriously into account, and because the Secretary of State had requested the Governor to stay the execution, it had complied with the Order.

3.17 Paraguay takes issue with these statements. It contends that (a) because responsible officials whose conduct is attributable to the United States could have halted the execution, but did not, the United States violated the Order and (b) the Order was binding.

3.18 There is thus a dispute over the United States' compliance with the Order of Provisional Measures entered in this proceeding. The Court has jurisdiction over that dispute both under the Optional Protocol and as a matter of its inherent jurisdiction.

3.19 *First*, the Court has jurisdiction under the Optional Protocol. Paraguay came to this Court to enforce its rights under the Vienna Convention. The Court issued the Order of Provisional Measures in order to preserve those rights pending its resolution of the merits. The Order therefore constituted the Court's provisional "interpretation and application" of the Convention. The parties' dispute whether the United States complied with the Order is therefore a dispute "arising out of the interpretation or application" of the Convention.

3.20 In the *Fisheries Jurisdiction Case*, the Court had issued orders indicating provisional measures that, among other things, called upon Iceland to take no action to aggravate or extend the dispute over fishing rights in waters surrounding the island.[96] Germany claimed that, after the orders had issued but prior to its submission of its memorial on the merits, Icelandic coastal patrol boats had forcibly interfered with German registered fishing vessels.[97] In its memorial, Germany requested a declaration that Iceland's post-application actions were unlawful under principles of international law.[98]

3.21 The Court held that it had jurisdiction to consider the claim:

> The matter raised . . . is part of the controversy between the Parties, and constitutes a dispute relating to Iceland's extension of fisheries jurisdiction. The submission is one based on facts subsequent to the filing of the Application, but arising directly out of the question which is the subject-matter of th[e] Application. As such it falls within the scope of the Court's jurisdiction defined in the compromissory clause [of the jurisdiction-conferring instrument].[99]

So too here, Paraguay's claim arising from the United States' failure to take all measures at its disposal to prevent the execution of Mr. Breard "is part of the controversy between the Parties, and constitutes a dispute relating" to the United States' adherence to the Vienna Convention.

---

[96] *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland), Interim Protection, Order of 17 August 1972, I.C.J. Reports 1972*, p. 30; *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland), Interim Protection, Order of 12 July 1973, I.C.J. Reports 1973*, p. 313.

[97] *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 179.

[98] *Ibid.*

[99] *Ibid.*, p. 203.

3.22 Reference to the preamble of the Optional Protocol removes any conceivable doubt about the Court's jurisdiction over this claim.[100] The preamble states the parties' "wish to resort in *all matters* concerning them *in respect of any* dispute *arising out of* the interpretation or application of the Convention." Even if the dispute over the Order did not constitute a dispute arising out of the interpretation or application of the Convention, it would surely qualify as a "matter concerning" Paraguay and the United States "in respect of" their original dispute over the Convention, which the Order was intended to freeze.

3.23 *Second*, the Court has jurisdiction over the parties' dispute with respect to the Order as a matter of its inherent jurisdiction.

3.24 The Court has long recognized that there are attributes of its authority that inhere in its status as a court of justice or court of law. In the *Nuclear Tests Cases*, the Court found that it

> possesses an inherent jurisdiction enabling it to take such action as may be required, on the one hand to ensure that the exercise of its jurisdiction over the merits, if and when established, shall not be frustrated, and on the other, to provide for the orderly settlement of all matters in dispute, to ensure the observance of the "inherent limitations on the exercise of the judicial function" of the Court, and to "maintain its judicial character." Such inherent jurisdiction . . . derives from the mere existence of the Court as a judicial organ established by the consent of States,

---

[100] *See* Vienna Convention on the Interpretation of Treaties, 23 May 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679, art. 31(2); *see also United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980*, pp. 25-26 (relying on preamble in construing Articles II and III of Optional Protocol).

> and is conferred upon it in order that its basic judicial functions may be safeguarded.[101]

The Court's inherent jurisdiction to safeguard "its basic judicial functions" must encompass the authority to determine when a party has complied with an order of the Court and what consequences should flow from noncompliance.[102] Indeed, if the Court has jurisdiction to determine compliance with more mundane orders, such as procedural rulings, surely it has jurisdiction to determine compliance with a matter of the import of an indication of provisional measures.[103]

---

[101] *Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974*, pp. 259-260 (quoting *Northern Cameroons, Judgment, I.C.J. Reports 1963*, pp. 15, 29-30); *see also Northern Cameroons, Judgment, I.C.J. Reports 1963*, p. 103 (separate opinion of Judge Fitzmaurice) ("[a]lthough much (though not all) of this incidental jurisdiction is specifically provided for in the Court's Statute, or in Rules of Court which the Statute empowers the Court to make, it is really an inherent jurisdiction, the power to exercise which is a necessary condition of the Court — or of any court of law — being able to function at all"); Elihu Lauterpacht, "'Partial' Judgments and the Inherent Jurisdiction of the International Court of Justice," in *Fifty Years of the International Court Justice: Essays in Honor of Sir Robert Jennings* (Vaughan Lowe & Malgosia Fitzmaurice, eds., 1996), p. 477 ("it would no doubt be the case that, even in the absence of statutory provision, the Court would be entitled to deal with [among other things, interim protection, preliminary objections, counter-claims, intervention] . . . in the exercise of its 'inherent' jurisdiction . . .").

[102] Bin Cheng, *General Principles of International Law: As Applied by International Courts and Tribunals* (1953), p. 266 ("[w]here a tribunal has jurisdiction in a particular matter, it is also competent with regard to all relevant incidental questions, subject to express provision to the contrary"); *cf.* Shabtai Rosenne, *The Law and Practice of the International Court of Justice, 1920-1996*, Vol. II (1997), p. 600 ("[w]here the inherent jurisdiction relates to matters not specifically regulated in the Statute or in the Rules of the Court, it may be inferred to have been assumed by the Court, in its designated capacity of judicial organ, applying to a concrete problem general principles of international procedural law not specifically mentioned in the Statute or the Rules").

---

[103] Shabtai Rosenne, *op. cit.*, Vol. II, p. 602 ("In addition to 'mainline' or 'merits' jurisdiction and the related incidental jurisdiction, the Court possesses inherent jurisdiction to control all aspects of the proceedings themselves."); Elihu Lauterpacht, *op. cit.*, p. 475 ("the Court is the master of its own procedure . . . . it is for the Court to decide . . . in what manner a case should be dealt with").

CHAPTER 4

THE UNITED STATES VIOLATED THE VIENNA CONVENTION ON CONSULAR RELATIONS

4.1 The record in this case establishes that the United States violated Paraguay's rights under the Vienna Convention in two respects. *First*, the United States undisputedly failed to provide Mr. Breard the notice that the Convention obliged it to provide. The United States thereby deprived Paraguay of the right to provide consular assistance to its national guaranteed by Articles 5 and 36 of the Convention. *Second*, by relying on the municipal-law doctrine of procedural default to deny Mr. Breard any opportunity to receive consular assistance before and during the trial on the charges against him, the United States violated its obligations under Article 36(2) of the Convention and well-established customary international law.

4.2 As the preamble to the Vienna Convention suggests, the rights at issue in this case have been a feature of international law from its inception, for "[c]onsular relations have been established between peoples since ancient times." An early form of consular assistance was recorded in the ancient Greek city states, where foreign merchants and seamen sought the protection of influential local nationals designated to protect their interests and act on their behalf before local tribunals and assemblies.[104] This practice evolved into the selection of magistrates from within the expatriate community to preside over the adjudication of its disputes, applying its own laws.[105]

---

[104] Luke Lee, *Consular Law and Practice* (1991), p. 4; Charles Rousseau, *Droit international public*, Tome IV (1980), p. 212 ("L'institution consulaire remonte à l'Antiquité."); Mohammed Ali Ahmad, *L'institution consulaire et le droit international* (1973), p. 10; Santiago Torres Bernardez, "La Conférence des Nations Unies sur les Relations Consulaires," *Annuaire français de droit international* (1963), p. 83 ("L'institution des consulats, beaucoup plus vielle que celle des missions diplomatiques permanentes, est née des besoins du commerce international et des rapports économiques entre les peuples et des nations. . . . [Elle] trouve des précurseurs dans l'antiquité . . .").

4.3 The direct antecedent to modern consular practice developed in the late Middle Ages, when States began sending envoys known as "consuls" to other States.[106] These consuls performed certain diplomatic functions in addition to exercising civil and criminal jurisdiction over the nationals of the sending State in the receiving State.[107]

4.4 Beginning in the 17th century, consular functions evolved to the modern model.[108] They remained closely focused, however, on the protection of the interests, commercial and otherwise, of their nationals.[109] By this century, the consul's right to protect nationals of the sending State and assist them before the competent authorities of the receiving State was established as a principle of customary international law.[110]

---

[105] Lee, *op. cit.*, p. 5; Ahmad, *op. cit.*, pp. 9-12; Rousseau, *op. cit.*, p. 212.

[106] Lee, *op. cit.*, p. 6; Sir Robert Jennings and Sir Arthur Watts, eds., *Oppenheim's International Law* (9th ed. 1991), p. 1132; Rousseau, *op. cit.*, p. 212; Ahmad, *op. cit.*, p. 13.

[107] Lee, *op. cit.*, p. 6; Ahmad, *op. cit.*, pp. 12-13.

[108] This evolution resulted from a combination of historical developments. First, as the newly centralized nation-states in Western Europe consolidated their powers, the consul's plenary jurisdiction over foreign nationals ceded to that of the receiving States, with certain exceptions. Oppenheim, *op. cit.*, pp. 1132-1133; Ahmad, *op. cit.*, p. 13; Rousseau, *op. cit.*, p. 213. Second, the establishment of permanent diplomatic missions limited the political duties of consuls. Lee, *op. cit.*, p. 6; Oppenheim, *op. cit.*, p. 1133.

[109] Rousseau, *op. cit.*, p. 213; Oppenheim, *op. cit.*, p. 1133. *Cf.* United Nations, *Official Records of the Conference on Consular Relations, Vol. I, Seventh Meeting of the First Committee*, para. 43, document A/CONF.25/16 (statement by Yugoslav delegate) (consular functions at the end of 18th century, in absence of bilateral treaties stating otherwise, centered on protecting rights and interests of nationals and giving them assistance).

4.5 Given the importance of the subject and centuries of relatively uniform practice among States, the law of consular relations was a ready target for the United Nations' mission of "encouraging the progressive development of international law and its codification."[111] In 1949, the International Law Commission provisionally designated consular relations as one of the fourteen subjects it considered proper for codification.[112] In 1955 the ILC began work on the subject, and in 1957 the Special Rapporteur submitted his report.[113] In 1961, the Commission, having obtained comments from governments, adopted the final text of the draft Articles.[114] The General Assembly convened the Conference on

---

[110] United Nations, *Official Records of the Conference on Consular Relations, Vol. I, Eighth Meeting of the First Committee*, paras. 35, 44, document A/CONF.25/16 (statement of Janoslav Zourek, Special Rapporteur on Consular Relations); *ibid., Eleventh Plenary Meeting*, agenda item 10, para. 14 (statement of Soviet delegate) (noting "very old rule of international law: the right of every state to protect its nationals."); Rousseau, *op. cit.*, p. 234 ("Fonction de protection — C'est elle qui est à la base de l'institution consulaire . . . . A ce titre les consuls doivent faire respecter les droits de leurs ressortissants et les aider dans leurs enterprises en intervenant éventuellement auprès des autorités compétentes. Etroitement liée à l'institution, cette fonction n'a pas besoin d'être stipulée dans une convention et ne peut être contestée par l'Etat territoriale."); Torres Bernardez, *op. cit.*, p. 85.

[111] U.N. Charter, art. 13(1); *see* Ian Brownlie, *Principles of Public International Law* (1990), p. 362.

[112] United Nations, *Official Records of the General Assembly, Report of the International Law Commission, 4th Session, Supplement No. 10*, paras. 16, 20, document A/925; *see also* Torres Bernardez, *op. cit.*, pp. 78-79.

[113] United Nations, International Law Commission, *Draft Provisional Articles on Consular Intercourse and Immunities: Report of Jaroslav Zourek, Special Rapporteur*, document A/CN.4/108.

[114] United Nations, *Official Records of the General Assembly, 16th*

(continued...)

Consular Relations, which was held in Vienna from 4 March to 22 April 1963 with the participation of 92 States.[115]

4.6 The Convention as adopted included detailed provisions, Articles 5 and 36, that codified the sending State's right to provide consular assistance to its nationals in the receiving State,, both generally and in the context of criminal proceedings against the national. As both delegates at the Conference and jurists have noted, the rights of consular protection and assistance codified in these articles "could well be regarded as the underlying objective for all other functions performed by consuls in the interest of the sending state."[116]

---

114. (...continued)
Session, Supplement No. 9, document A/4843.

[115] General Assembly Resolution 1685 (XVI), United Nations, *Official Records of the General Assembly, 16th Session, Supplement No. 17*, p. 61, document A/5100.

[116] Victor M. Uribe, "Consuls at Work: Universal Instruments of Human Rights and Consular Protection in the Context of Criminal Justice," *Hous. J. Int'l L.*, Vol. 19 (1997), pp. 375, 379. The Vienna Conference delegate from Mali, referring to Article 36 as a whole, stated:

> [T]he protection of nationals of the sending State was the principal function of consulates . . . . The natural protector of a person abroad was undoubtedly his country's consul. In the case of arrest, for example, the consul should be notified immediately so that he could take whatever action was needed under article 5.

United Nations, *Official Records of the Conference on Consular Relations, Vol. I., Sixteenth Meeting of the Second Committee*, para. 12, document A/CONF.25/16; *see also ibid., Seventeenth Meeting of the Second Committee*, paras. 17 and 19 (statements of Tunisian and United Kingdom delegates); Brief of *Amici Curiae* Republic of Argentina, Republic of Brazil, Republic of Ecuador and Republic of Mexico In Support of Petition for a Writ of Certiorari, *Paraguay v. Gilmore*, __ U.S. __, 118 S. Ct. 1352, p. 1, Annex 28 ("The protection and support of persons who have been charged with crimes, convicted, or imprisoned by a foreign national has (continued...)

4.7 It is those rights which the United States violated in the case of Angel Breard and for which Paraguay seeks reparation here.

I.

The United States Deprived Paraguay of Its Right to Provide Consular Assistance by Failing to Provide the Required Notification to Mr. Breard

A. ARTICLE 36(1)(b) REQUIRED NOTIFICATION TO MR. BREARD IN ORDER TO PERMIT PARAGUAY TO EXERCISE ITS RIGHT OF CONSULAR ASSISTANCE

4.8 It is uncontested in this proceeding that Article 36(1)(b) required responsible officials of the United States to provide Mr. Breard with notice of his right to contact the Paraguayan consul. The ordinary meaning of that provision, taken in its context and in the light of its object and purpose, confirms that obligation.[117]

4.9 The principal purpose of the Vienna Convention is to guarantee a State Party the right to perform consular functions within the territory of those States Parties with which it has established

---

116. (...continued)
always been a critical function of consular officials."); Mariel Revillard, "Consul (Attributions)," *Encyclopédie juridique (Dalloz), Répertoire de droit international,* para. 28 (forthcoming, 1998) ("La protection des nationaux qui se trouvent dans l'Etat de résidence répond au but même de l'institution consulaire."); J. Irizarry y Puenta, *Traité sur les fonctions internationales des consuls* (traduit par C. Schlegel) (1937), p. 274 ("Le droit de protection est, sans aucun doute, le premier, le plus important et le plus actif devoir dans le domaine toujours plus vaste de l'action consulaire."); Ellery C. Stowell, *Le consul: fonctions, immunités, organisation* (1909), p. 62 ("On peut dire que cette fonction du consul est la plus important de toutes."); Pradier-Fodéré, *Droit international public* (1885), p. 555 ("C'est par les consuls . . . que l'Etat étend ses bras protecteurs sur toute la surface du globe.").

[117] *See* Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679, art. 31.

consular relations.[118] Article 5 of the Convention defines consular functions to include

> (a) protecting in the receiving state the interests of the sending state and of its nationals, both individuals and bodies corporate, within the limits permitted by international law; [and]
>
> . . .
>
> (e) helping and assisting nationals, both individuals and bodies corporate, of the sending state;
>
> . . . .

4.10 Article 36 of the Convention sets forth a mechanism to ensure that consular officials may perform those functions in a specific setting: that of a national who has been detained by authorities of the receiving State. "With a view to facilitating the exercise of consular functions relating to nationals of the sending state," Article 36(1)(a) guarantees the right of consular officers "to communicate with nationals of the sending state and to have access to them . . . ," as well as the corollary right of nationals to communicate with and have access to their consular officers. Article 36(1)(b) also requires the competent authorities of a State Party to advise, "without delay," any detained national of another State Party that he has the right to contact his consulate. Then, "if he so requests, the competent authorities of the receiving state shall, without delay, inform the consular post of the sending state if, within its consular district, a national of that state is arrested or committed to prison or to custody pending trial or is detained in any other manner."[119]

---

[118] *See* Vienna Convention on Consular Relations, 24 April 1963, 596 U.N.T.S. 261, 21 U.S.T. 77, preamble (purpose of privileges and immunities granted by Convention is "to ensure the efficient performance of functions by consular posts on behalf of their respective States"); *ibid.*, art. 3 ("Consular functions are exercised by consular posts. They are also exercised by diplomatic missions in accordance with the provisions of the present Convention.").

[119] The terms of this provision make clear that it creates rights not only in the State Party but also for the detained national. *Ibid.*, art. 36(1)(b) ("The said authorities shall inform the person concerned without delay of
(continued...)

4.11 Obviously, a sending State cannot "exercise . . . consular functions" with respect to a detained national if the receiving State does not advise it of the detention. As Argentina, Brazil, Ecuador, and Mexico said in their brief *amici curiae* to the United States Supreme Court:

> [c]onsuls can discharge [their] responsibility only if they know of the detention of their nationals by law enforcement authorities. Article 36 of the Convention is designed specifically to ensure that consuls *do* know of the detention of their nationals, and compliance with it is therefore indispensable to the effective performance of consular functions.[120]

Failing to provide the requisite notice to a detained foreigner of his rights under Article 36 necessarily entails a violation of the sending State's rights to render consular protection and assistance to its national, as guaranteed by Articles 5 and 36.

4.12 The *travaux préparatoires* of the Vienna Convention confirm the integral relationship between the sending State's right of consular assistance and the receiving State's obligation to provide prompt notification to the detained national. The United Kingdom delegate urged that "it was essential to introduce a provision to the effect that the authorities of the receiving State should inform the person concerned without delay of his rights," if the Conference were to forgo the automatic notification of the consulate provided in the International Law Commission draft in favor of a proposal to notify

---

119. (...continued)
his rights under this sub-paragraph.") (emphasis supplied); *see Memorial of the United States, United States Diplomatic and Consular Staff in Tehran, I.C.J. Pleadings 1980*, p. 174 ("Article 36 establishes rights not only for the consular officer but, perhaps even more importantly, for the nationals of the sending State who are assured access to consular officers and through them to others.").

[120] Brief of *Amici Curiae* Republic of Argentina, Republic of Brazil, Republic of Ecuador and Republic of Mexico In Support of Petition for a Writ of Certiorari, *Paraguay v. Gilmore*, __ U.S. __, 118 S. Ct. 1352, p. 1 (No. 97-1390) (emphasis in original), Annex 28.

the consul only "if [the national] so requests."[121] A provision for notice upon the national's request, without more, would be unworkable, the delegate asserted, "because it could give rise to abuses and misunderstandings. *It could well make the provisions of article 36 ineffective because the person arrested might not be aware of his rights.*"[122]

B. THE UNITED STATES DID NOT PROVIDE THE REQUISITE NOTICE

4.13 As the United States has acknowledged, its competent officials did not notify Mr. Breard at any time after his arrest, and *a fortiori* not "without delay," of his right to contact the Paraguayan consulate. "There is an admitted failure by the Commonwealth of Virginia to have afforded Paraguay timely consular access, that is to say, there is an admitted breach of treaty."[123]

---

[121] United Nations, *Official Records of the Conference on Consular Relations, Vol. I, Twentieth Plenary Meeting*, agenda item 10, para. 73, document A/CONF.25/16.

[122] *Ibid.* (emphasis supplied). *See also ibid., Eleventh Plenary Meeting*, agenda item 10, paras. 13-14 (before the amendment offered by the United Kingdom was added to Article 36(1)(b), the Soviet delegate also expressed concern that "[t]he proposal that the consul should be informed of the arrest of a national of the sending State only at the request of the person concerned could not withstand criticism. What guarantee was there that the person concerned had been informed of his right . . .?" For this reason, the Soviet delegate considered that anything short of automatic notification "conflicted with a very old rule of international law: the right of every State to protect its nationals."); *see also ibid.*, para. 8 (statement of delegate from Ghana).

[123] *Vienna Convention on Consular Relations (Paraguay v. United States), Provisional Measures, Order of 9 Apr. 1998, Declaration of President Schwebel. See also ibid., Oral Argument*, para. 1.4 (statement of David R. Andrews); Brief for United States as *Amicus Curiae*, p. 12, *Breard v. Greene*, __ U.S. __, 118 S. Ct. 1352 (1998) ("the Executive Branch has conceded that the Vienna Convention was violated"), Annex 21.

4.14 Because the United States breached its obligation to provide the requisite notice, Paraguay was unaware that Mr. Breard was detained by the United States until April 1996.[124] Mr. Breard also was unaware of his right to consular assistance until consular officers met with him in late April 1996 — about three years after he had been arrested, tried, convicted, and sentenced to death.[125] Paraguay had no opportunity to provide consular assistance to its national between his arrest in September 1992 and April 1996, when it learned of Mr. Breard's detention without any assistance from the United States.

4.15 Thus, by its admitted failure to provide the notification mandated by Article 36, the United States deprived Paraguay of its right to render consular assistance to its national at the time when such assistance was most urgently needed: between Mr. Breard's arrest and the conclusion of the trial of the charges against him.

C. THE UNITED STATES' VIOLATION RENDERS IT INTERNATIONALLY RESPONSIBLE FOR ITS WRONGFUL ACTS

4.16 The conceded violation of the United States' obligations under Article 36 of the Vienna Convention constitutes a clear breach of international law. Under the principle of *pacta sunt servanda*, the United States was required to abide by its obligations under the Vienna Convention. Instead, the United States committed an internationally wrongful act for which it is responsible under international law.[126] "It is of obvious importance to the maintenance

---

[124] Valdez Stmt., para. 4, Annex 7; Caballero Stmt., para. 3, Annex 16; Sra. Breard Aff., para. 7, Annex 1.

[125] Sra. Breard Aff., para. 8, Annex 1.

[126] *Draft Articles on State Responsibility, Report of the International Law Commission, United Nations, Official Records of the General Assembly, 51st Session, Supplement No. 10*, arts. 1, 3, document A/51/10 ("Every internationally wrongful act of a State entails the international responsibility of that State."); *Corfu Channel, Merits, Judgment, I.C.J. Reports 1949*, p. 23; Peter Malanczuk, *Akehurst's Modern Introduction to*

(continued...)

and development of a rule of law among States that the obligations imposed by treaties be complied with and that, where they are not, reparation be required."[127]

1. No Prejudice Need Be Shown for State Responsibility to Attach

4.17 Contrary to the United States' contention during the hearing on provisional measures, international law does not require a showing of prejudice before the offending State's international responsibility is engaged. Rather,

> [l]a responsabilité est le corollaire nécessaire du droit. Touts droits d'ordre international ont pour conséquence une responsabilité internationale. La responsabilité entraîne comme conséquence l'obligation d'accorder une réparation au cas où l'obligation n'aurait pas été remplie.[128]

---

126. (...continued)
International Law (7th ed. 1997), p. 254 ("If a state violates a rule of customary international law or ignores an obligation of a treaty it has concluded, it commits a breach of international law and thereby a so-called 'internationally wrongful act.'").

[127] *Vienna Convention on Consular Relations (Paraguay v. United States), Provisional Measures, Order of 9 Apr. 1998, Declaration of President Schwebel.*

[128] *Affaires des biens britanniques au Maroc espagnol (Sp. - Gr. Brit.), 1 May 1925*, 2 R.I.A.A. 641; *Factory at Chorzów, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9*, p. 21 ("It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation, therefore, is the indispensable complement of a failure to apply a convention, and there is no necessity for this to be stated in the convention itself."); *Factory at Chorzów, Indemnity, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17*, p. 29 (same); *Corfu Channel, Merits, Judgment, I.C.J. Reports 1949*, p. 23; *Restatement (Third) of the Foreign Relations Law of the United States* §
(continued...)

4.18 Thus, under established principles of international law, the United States' admitted violation of the Vienna Convention should begin and end the inquiry of whether its international responsibility has been engaged. The only question outstanding is that of the reparation owed, which is addressed in Chapter 6.

2. *Prejudice Is Amply Established on this Record in Any Event*

4.19 Although prejudice is not required to establish the United States' responsibility for its violations of the Vienna Convention, the record in this case is replete with evidence of prejudice both to Paraguay and to its national.

a. *Injury to Paraguay*

4.20 The United States' violation of the Vienna Convention deprived Paraguay of its right to protect and assist its national in the gravest of circumstances: where the receiving State, in its municipal proceedings, threatens not only the liberty, but the very life of the national. The breach at issue here was of rights directly and specifically granted to Paraguay under Article 36(1) as the sending State of which Mr. Breard was the national. As a direct result of the violation, Paraguay was unable to render any consular assistance during a three-year period that included the most crucial moments of the proceedings against its national. In short, the United States deprived Paraguay of the right to exercise an important governmental function at the only time when that function could have fulfilled its purpose: providing meaningful protection and assistance to a Paraguayan national on trial for his life.

---

128. (...continued)
901 (1987) ("Under international law, every state that has violated a legal obligation to another state is required to terminate the violation and, ordinarily, to make reparation . . . ."); Rousseau, *op. cit.*, p. 210 ("La réparation est une conséquence nécessaire de l'acte illicite.").

4.21 There can be no doubt that the rights at issue are substantial rights in international law. The United States itself has acknowledged that "Article 36 of the Vienna Convention contains obligations of the highest order and should not be dealt with lightly."[129] Indeed, the United States advised this Court in the *Case Concerning United States Diplomatic and Consular Staff in Tehran* that the right of consular "communication is so essential to the exercise of consular functions that its preclusion would render meaningless the entire establishment of consular relations."[130]

4.22 The three-year delay between Mr. Breard's arrest and Paraguay's first opportunity to provide him consular assistance exacerbated both the violation and the injury. Indeed, the *timing* of the consular notification and assistance is an express and integral aspect of the rights granted by Article 36(1).

4.23 The words "without delay" appear in each of the three sentences that constitute Article 36(1)(b). The focus on rapid notification and communication reflects a recognition that, in many cases, unless consular assistance can be provided at the outset of the proceedings, no effective assistance will be provided at all. For example, the United States' manual on consular affairs provides:

> §411: In order for the consular officer to perform the protective function in an efficient and timely manner, it is essential that the consul obtain prompt notification whenever a U.S. citizen is arrested. *Prompt notification is necessary* to assure early access to the arrestee. *Early access in turn is essential*, among other things, to receive any allegations of abuse [and] to provide a list of lawyers and a legal system fact sheet to prisoners.

---

[129] Arthur W. Rovine, U.S. Dep't of State, *Digest of United States Practice in International Law* (1973), p. 161. *See also* authorities cited *supra* note 116.

[130] *Memorial of the United States, United States Diplomatic and Consular Staff in Tehran, I.C.J. Pleadings 1980*, p. 174 (citations omitted).

> §411.3: . . . *Without such prompt notification of arrest, it is impossible to achieve the essential timely access* to a detained U.S. citizen.
>
> §412: *[P]rompt personal access* . . . provides an opportunity for the consular officer to explain the legal and judicial procedures of the host government and the detainee's rights under that government *at a time when such information is most useful.*[131]

4.24 By breaching its obligations to Paraguay under the Vienna Convention over an extended period of time, the United States caused specific and substantial prejudice to the rights and interests of Paraguay as a sovereign State.

b. Injury to Paraguay's National

4.25 The record also contains ample evidence of prejudice to Paraguay's national, which is an injury to Paraguay under established principles of international law.[132] From the moment of his arrest for a capital crime, Angel Breard was in great need of the assistance of a consular officer who could explain the United States criminal justice system to him in terms that he could understand. Instead, Mr. Breard had only the assistance of court-appointed counsel unfamiliar with his cultural background and unable to explain why his assumptions concerning the defense of a criminal case were unreasonable in the context of criminal justice in Virginia.

---

[131] U.S. Dep't of State, *Foreign Affairs Manual* (1984), Annex 4 (emphasis added).

[132] *See Mavrommatis Palestine Concessions, Jurisdiction, 1924, P.C.I.J., Ser. A., No. 2*, p. 12 ("whether the present dispute originates in an injury to a private interest . . . is irrelevant from this standpoint. Once a State has taken up a case on behalf of one of its subjects before an international tribunal, in the eyes of the latter the State is sole claimant.").

4.26 As the United States instructs its own consular officers:

> [t]raditionally one of the basic functions of a consular officer has been to provide a "cultural bridge" between the host community and the officer's own compatriots traveling or residing abroad. No one needs that cultural bridge more than the individual U.S. citizen who has been arrested in a foreign country or imprisoned in a foreign jail.[133]

4.27 During the course of the proceedings against him, Mr. Breard made a number of objectively unreasonable decisions. Most important, Mr. Breard, despite the advice of his attorneys, rejected a plea offer by the Virginia prosecutor that would have guaranteed him a sentence of imprisonment for life rather than a death sentence. He rejected the plea offer not in the hope of being acquitted, but rather in order to testify as a witness, again contrary to the advice of his lawyers, and confess the crime to the jury. In rejecting the plea offer, Mr. Breard discarded a guaranteed sentence of life imprisonment in favor of a trial where, given his determination to confess his guilt, the only possible outcomes were a sentence of death or a sentence of life imprisonment. This decision was plainly irrational, as it put his life at risk without any prospect of a better result than that offered by the prosecution.

4.28 Unquestionably, the best evidence of why Mr. Breard decided to reject the plea offer would be Mr. Breard's own testimony on the subject. Mr. Breard, however, is no longer available to testify in these proceedings. By executing Mr. Breard in the face of this Court's Order to the contrary, the United States has deprived Paraguay, and the Court, of the ability to obtain that best evidence.

4.29 Thus, in the Request accompanying this Memorial, Paraguay requests that, if and to the extent that there are any disputed issues of fact that are material to Paraguay's claims as to which Mr. Breard's testimony would have been relevant, the Court, in the exercise of its authority pursuant to Articles 48 and 49 of the Statute, deem those facts established in Paraguay's favor in order to remedy the evidentiary prejudice suffered by Paraguay by virtue of the United States' execution of Mr. Breard.

---

[133] U.S. Dep't of State, *Foreign Affairs Manual*, 7 FAM § 401 (1984), Annex 4.

4.30 Even without evidence from Mr. Breard, however, the record contains compelling evidence that his decision to reject the plea offer resulted from a misunderstanding of the United States criminal justice system — a misunderstanding that could have, and would have, been rectified through the assistance of Paraguayan consular officers. Whereas plea bargaining is commonplace in United States criminal proceedings, it is unknown in Paraguay, where any such arrangement between prosecutor and defendant would be void.[134] On the other hand, the Paraguayan penal code expressly provides for a reduction in sentence where the defendant's confession is, as was the case in the proceedings against Mr. Breard, the only direct evidence of the crime.[135] Certain other aspects of Paraguayan criminal procedure also favor the confession as a strategic choice for defendants seeking leniency.[136]

4.31 Thus, the notion of making a deal with the prosecution would not make sense to a Paraguayan unfamiliar with the United States legal system, such as Mr. Breard. Mr. Breard's decision to reject the plea offer and confess his crime in open court would have been a rational one in the Paraguayan criminal justice system. In the United States, however, it was deadly folly.

4.32 The record before the Court establishes that, had the United States fulfilled its obligation to notify him of his right to consular assistance, Mr. Breard would have contacted his consulate.[137] Had Mr. Breard requested consular assistance, Paraguayan officials would have intervened at the beginning of Mr.

---

[134] Macchi Aff., para. 3, Annex 13.

[135] *Ibid.*, para. 4.

[136] *See ibid.*

[137] Sra. Breard Aff., para. 9, Annex 1; Caballero Stmt., para. 10, Annex 16.

Breard's legal proceedings with the same energy and expertise that they brought to their later efforts to obtain a new trial for him in the municipal courts of the United States. Paraguayan consular officers would have explained to Mr. Breard the fundamental differences between United States and Paraguayan criminal justice in terms that Mr. Breard could understand, just as they ultimately did.[138] Specifically, Paraguayan consular officers would have reviewed with Mr. Breard why rejecting the plea offer in favor of confessing at trial would be unreasonable, and they would have recommended that Mr. Breard accept the plea offer.[139] If Mr. Breard had had the benefit of this assistance from the beginning of his legal proceedings, he would have accepted the plea, and would not have been sentenced to death and executed.[140]

4.33 Simply put, in the circumstances of Mr. Breard's case, consular assistance was a matter of life and death. The United States' violation of its international obligations prevented Paraguay from acting in a manner that would have saved its national's life.

II.

The United States Violated the Vienna Convention by Its Application of the Municipal-Law Doctrine of Procedural Default

4.34 The United States also violated Paraguay's rights by applying its municipal law so as to thwart Mr. Breard's efforts to receive consular assistance from Paraguay before and during a trial of the charges against him. Specifically, when Mr. Breard sought post-conviction relief on the ground that he had been tried, convicted, and sentenced to death without the assistance of Paraguay's consul, the United States applied the doctrine of procedural default to defeat his efforts to receive Paraguay's consular assistance at a new trial. The United States' application of this doctrine in Mr. Breard's case cannot be reconciled with its obligations under Article 36(2) of the Vienna Convention.

---

[138] Valdez Stmt., paras. 5-6, Annex 7; Prieto Aff., para. 10, Annex 6.

[139] Valdez Stmt., para. 8, Annex 7.

[140] Caballero Stmt., para. 10, Annex 16; Sra. Breard Aff., para. 7, Annex 1.

A. THE UNITED STATES WAS OBLIGATED TO APPLY MUNICIPAL LAW SO AS TO GUARANTEE THE EXERCISE OF THE RIGHTS ACCORDED BY ARTICLE 36 OF THE VIENNA CONVENTION

4.35 Under Article 36(2) of the Vienna Convention, the United States was required to ensure that its municipal law and regulations "enable[d] full effect to be given to the purposes for which the rights accorded under this Article are intended."

4.36 As discussed above, a principal purpose of Article 36 is to ensure that States Parties are able to render consular assistance to nationals detained and charged with crimes by other States Parties. As the terms of Article 36(1)(b) make clear, the rights accorded under that Article were intended to be made known, and exercised, "without delay" after the initial detention of the national. Thus, under Article 36(2), the United States was obligated to ensure that its municipal law "enable[d] full effect to be given" to Paraguay's right to provide, and Mr. Breard's right to receive, consular assistance in a timely fashion relative to the arrest and trial of the charges against him.

4.37 A review of the drafting history of Article 36(2) confirms the breadth of the obligation it imposes. The paragraph as originally proposed by the International Law Commission provided as follows:

> The rights referred to in paragraph 1 of this article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations *must not nullify* these rights.[141]

---

[141] United Nations, *Official Records of the Conference on Consular Relations, Vol. II, Annexes — Draft articles on consular relations*, p. 24, (continued...)

The Second Committee expanded the International Law Commission's proviso to the form that the States Parties ultimately adopted: "the said laws and regulations must *enable full effect to be given to the purposes* for which the rights accorded under this Article are intended."[142] This formulation is substantially broader than the International Law Commission proposal in two respects. *First*, it requires the municipal law of States Parties to give "full effect" to the Convention, rather than merely refraining from nullifying the rights accorded by the Convention. *Second*, the obligation to give full effect extends not to the rights accorded by Article 36, but instead to "the purposes for which the rights . . . are intended." As Luke Lee observes:

> [The] reference to the purposes underlying the rights instead of merely the rights themselves must be understood as an expansion of the operation of the proviso in paragraph 2 intended to discourage any technical argument as to whether a particular provision of municipal law was consistent with the Convention, where the overall effect of such a provision was to diminish the full exercise of the rights accorded by the Convention.[143]

4.38 At a plenary meeting of the Conference, the delegate from the Soviet Union proposed restoring the International Law Commission's weaker version.[144] The delegate from the United Kingdom disagreed with the proposed Soviet amendment, stating that

---

141. (...continued)
document A/CONF.25/16 (emphasis supplied).

[142] United Nations, *Official Records of the Conference on Consular Relations, Vol. I, Eighteenth Meeting of the Second Committee*, para. 47, document A/CONF.25/16; *ibid., Nineteenth Meeting of the Second Committee*, para. 10 (emphasis supplied).

[143] Affidavit of Luke T. Lee (1 Oct. 1998), para. 5, Annex 29.

[144] United Nations, *Official Records of the Conference on Consular Relations, Vol. I, Twelfth Plenary Meeting*, paras. 3-4, document A/CONF.25/16.

"it was most important that the *substance* of the rights and obligations specified in paragraph 1 be preserved, which they would not be if the Soviet Union amendment were adopted."[145] The Conference rejected the Soviet amendment.

B. THE UNITED STATES BREACHED ITS INTERNATIONAL OBLIGATIONS BY APPLYING THE DOCTRINE OF PROCEDURAL DEFAULT IN MR. BREARD'S CASE

4.39 Having committed an internationally wrongful act by violating Article 36(1) of the Vienna Convention, the United States was required under established principles of State responsibility to eliminate the effects of its illegal acts[146] and abide by its "continued duty . . . to perform the obligation it ha[d] breached"[147] by respecting Paraguay's right to render consular protection and assistance before and during the trial of the charges against Mr. Breard. Like that of many States, the United States' municipal law included procedures by which Mr. Breard could have sought a new trial — at which he could have received the consular assistance guaranteed by the Vienna Convention — on the ground that the competent authorities failed to comply with the requirements of international law in his initial trial.

---

[145] *Ibid.*, para. 7 (emphasis supplied).

[146] Oscar Schachter, *International Law in Theory and Practice: General Course in Public International Law* (1985), p. 190 ("When a State is internationally responsible for a wrongful act, it is under an obligation to discontinue the act and to prevent the continuing consequences of the effects of the act."). *Cf. Draft Articles on State Responsibility, op. cit.*, art. 41 ("A State whose conduct constitutes an internationally wrongful act having a continuing character is under the obligation to cease that conduct, without prejudice to the responsibility it has already incurred."); *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 54; *Haya de la Torre, I.C.J. Reports 1951*, p. 82.

[147] *Draft Articles on State Responsibility, op. cit.*, art. 36(2).

4.40 The courts of the United States, however, held that those procedures were not available to Mr. Breard. They did so on the basis of a municipal-law doctrine known as "procedural default," which was codified in 1996 in a statute called the Anti-Terrorism and Effective Death Penalty Act.[148] Under the doctrine, a criminal defendant may not obtain post-conviction relief in federal court upon a ground that was not first raised in post-conviction relief proceedings in state court.[149]

4.41 Applying the doctrine, the courts of the United States barred Mr. Breard from raising a Vienna Convention claim in his federal *habeas* proceeding even though (a) he had not known during the prior proceedings of his right under the Convention to contact the Paraguayan consulate, and (b) the very purpose of the notification requirement that the United States breached is to ensure that a detained national in Mr. Breard's position is apprised of that right.[150]

4.42 The Supreme Court recognized that application of the procedural-default doctrine to bar Mr. Breard's attempt to obtain a new trial at which he would exercise his Vienna Convention rights was, on its face, inconsistent with the "Vienna Convention — which arguably confers on an individual the right to consular assistance following arrest . . . ."[151] The Court reasoned, however, that the United States' enactment of the Anti-Terrorism and Effective Death Penalty Act in 1996 limited the application of the Vienna Convention: "Breard's ability to obtain relief based on violations of the Vienna Convention is subject to this subsequently-enacted rule . . . ."[152]

---

[148] *Breard v. Greene*, __ U.S __, 118 S. Ct. 1352, 1355 (1998).

[149] *Breard v. Netherland*, 949 F. Supp. 1255 (E.D. Va. 1996).

[150] *Breard v. Pruett*, 134 F.3d 615 (4th Cir. 1998); *Breard v. Greene*, __ U.S. __, 118 S. Ct. 1352 (1998).

[151] *Breard v. Greene*, 118 S. Ct. at 1355.

[152] *Ibid.*

4.43 The United States' application of its municipal laws and regulations in Mr. Breard's case plainly did not "enable full effect to be given to the purposes for which the rights accorded under . . . Article [36] are intended."[153] Although the United States was internationally obligated to remedy its admitted violation of the Vienna Convention in Mr. Breard's case, it applied its municipal law in such a manner as to render meaningless the right to consular assistance provided by the Convention — a right of which Mr. Breard was unaware precisely because of the United States' breach of its international obligation.[154]

4.44 Thus, although the United States is internationally obligated to abide by the obligations it assumed in becoming a State Party to the Vienna Convention,[155] its courts, including its Supreme Court, interpreted municipal law to limit the application of the Vienna Convention in Mr. Breard's case.[156] The United States' application of municipal law thereby violated not only Article 36(2), but also the rule of customary law that a State may not plead the requirements of its domestic legal system to excuse its failure to abide by or implement international law.[157]

---

[153] Vienna Convention, art. 36(2). *See* Lee Aff., paras. 4-9, Annex 29.

[154] The Government of Mexico has requested an advisory opinion from the Inter-American Court of Human Rights on the question of, *inter alia*, the juridical consequences for foreign nationals who were not informed of their right to consular assistance in proceedings against them in the United States. Request for an Advisory Opinion Submitted by the Government of the United Mexican States, Inter-American Court of Human Rights, 17 November 1997. An advisory opinion is anticipated in late 1998 or in 1999.

[155] Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679, art. 27; *Draft Articles on State Responsibility*, *op. cit.*, arts. 4-6; Ian Brownlie, *State Responsibility (Part I)* (1983), pp. 141-43; Ian Brownlie, *Principles of International Law* (1990), p. 35.

[156] "It is a well-settled principle of international law that every internationally wrongful act of the judiciary of a state is attributable to that state." *Islamic Republic of Iran v. United States of America, Award No. 586-A27-FT, Iran-U.S. Claims Tribunal, 5 June 1998*, para. 71. *See Draft Articles on State Responsibility, op. cit.*, art. 6; Ian Brownlie, *Principles of Public International Law* (1990), pp. 449-50; Ian Brownlie, *State Responsibility (Part I)* (1983), p. 144; Eduardo Jiménez de Aréchaga, "International Responsibility," in *Manual of Public International Law*
(continued...)

4.45 In rejecting the weaker language proposed by the ILC in favor of the broad, current formulation of the proviso to Article 36(2), the States Parties stated their intent that "the *substance* of the rights and obligations specified in paragraph 1 [of the Article] be preserved . . . ."[158] Paraguay respectfully submits that the United States' application of municipal law in Mr. Breard's case did nothing to preserve the substance of the rights accorded under Articles 5 and 36 of the Convention. The United States' actions breached its obligation under Article 36(2) to accord "full effect" to the rights accorded.

---

156. (...continued)
(Max Sørensen ed., 1968), pp. 550-557.

[157] Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679, art. 27; Ian Brownlie, *Principles of International Law* (1990), p. 35; *Draft Articles on State Responsibility, op. cit.*, arts. 4-6. *See also* Jiménez de Aréchaga, *op. cit.*, p. 557 ("It is a generally accepted principle of international law that a federal state is responsible for the conduct of its political subdivisions and cannot evade that responsibility by alleging that its constitutional powers of control over them are insufficient for it to enforce compliance with international obligations."); *Free Zone of Upper Savoy and the District of Gex, Judgment, 1932, P.C.I.J., Series A/B, No. 46*, p. 167 (France not permitted to rely on own legislation to limit scope of international duty); *Greco-Bulgarian "Communities," Advisory Opinion, 1930, P.C.I.J., Series B, No. 17*, p. 32 (between treaty parties provisions of municipal law cannot prevail over treaty obligations); *Treatment of Polish Nationals in Danzig, 1931, P.C.I.J., Series A/B, No. 44*, p. 24 (State cannot use own constitution to excuse international law violations).

[158] United Nations, *Official Records of the Conference on Consular Relations, Vol. I, Twelfth Plenary Meeting*, agenda item 10, para. 7, document A/CONF.25/16 (statement of U.K. delegate) (emphasis supplied).

CHAPTER 5

BY EXECUTING MR. BREARD, THE UNITED STATES VIOLATED A BINDING ORDER OF THIS COURT

5.1 By its Order of Provisional Measures of 9 April 1998, this Court indicated that "[t]he United States should take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in these proceedings." With full knowledge of that Order, the Governor of Virginia directed that the execution proceed, and the United States Government took no legally effective steps to stop it.

5.2 There can be no question that the United States thereby breached the Order of this Court. Equally, there can be no question that the Order was binding.

5.3 The United States does not dispute that, pursuant to Article 94(1) of the United Nations Charter, it has "undertake[n] to comply with the decision" in this proceeding. As Article 41 expressly states, the Court's authority to indicate provisional measures is intended to preserve the rights of the parties pending a decision on the merits, so that one party's unilateral conduct does not deprive the Court of the capacity to render a meaningful judgment after both parties have been fully heard. The authority of the Court to indicate provisional measures is thus fundamental to the Court's role as a "*judicial* organ" — an organ that resolves disputes by the considered application of law, not the unfettered exercise of power. Simply put, it is impossible to reconcile, on the one hand, a party's obligation to comply with a decision of the Court with, on the other, the liberty to deprive the Court of the capacity to render an effective decision in favor of the adverse party.

5.4 This case illustrates perfectly — indeed, graphically — why an indication of provisional measures must be binding. Paraguay's national is now dead at the hands of the Commonwealth of Virginia. Because of the deliberate conduct of competent officials of the United States, this Court is no longer in a position to issue a judgment granting Paraguay *restitutio in integrum* in the form of a new trial for its national or the reconveyance of the plea offer. Equally, the United States is no longer in a position to comply with any such judgment. By going forward with the execution in disregard of the Court's Order, the United States wrested from this Court, and arrogated to itself, the authority to determine whether Paraguay would be granted the relief it sought.

5.5 Indeed, in announcing that the execution would proceed, the Governor of Virginia candidly acknowledged the incentive to lawlessness created by the United States' position that he was not bound to comply with the Order. By his own account, the Governor refused to grant a temporary reprieve from the execution because he was

> concerned that to delay Mr. Breard's execution so that the International Court of Justice may review this matter would have the practical effect of transferring responsibility from the courts of the Commonwealth and the United States to the International Court. *Should the International Court resolve this matter in Paraguay's favor, it would be difficult, having delayed the execution so that the International Court could consider the case, to then carry-out the jury's sentence despite the rulings [of] the International Court.*[159]

In other words, far from "tak[ing] all measures . . . to ensure that . . . Breard [was] not executed,"[160] the Governor acted to ensure that this Court's eventual decision on the merits could not *prevent* the execution.

5.6 Because this Court is a court, and because its job is to apply law, the United States cannot have had the right to act as it did. Paraguay's claim for relief for the United States' violation of the

---

[159] Statement of Governor Jim Gilmore (14 Apr. 1998), p. 2 (emphasis added), Annex 24.

[160] *Case Concerning the Vienna Convention on Consular Relations (Paraguay v. United States of America), Provisional Measures, Order of 9 April 1998*, para. 41.

Order of Provisional Measures requires the Court to consider the very nature of the authority it exercises.

I.

The United States Violated the Order of Provisional Measures

5.7 At the time of the Order, Mr. Breard was in a correctional facility of the Commonwealth of Virginia. From that time until his execution, Virginia officials had full control over his person. Virginia officials executed Mr. Breard by lethal injection on 14 April 1998, as scheduled.

5.8 The Governor of Virginia is the chief executive official of the Commonwealth. Under Virginia law, the Governor has plenary power to grant reprieves of capital sentences.[161] Relying on the advice of the United States that the Order was not binding, he permitted the execution to go forward.[162] The Governor explained that he did not grant Mr. Breard a reprieve because he did not want to risk the possibility that this Court might render the judgment that Paraguay had requested.[163]

5.9 Plainly, the occurrence or nonoccurrence of the execution was within the control of the Governor of Virginia. Plainly, he did not "take all measures at [his] disposal" to halt the execution. The

---

[161] *See* Va. Stat. Ann. § 53.1-229 ("[T]he power to commute capital punishment and to grant pardons or reprieves is vested in the Governor."), Annex 10; *ibid.* § 53.1-232(D) ("Should the condemned prisoner be granted a reprieve by the Governor . . . the Director [of Corrections] shall yield obedience to [such reprieve]"). At the end of the term of reprieve by the Governor, an execution may proceed without resentencing. *See ibid.* § 53.1-232(C).

[162] Statement of Governor Jim Gilmore (14 Apr. 1998), p. 2, Annex 24.

[163] *Ibid.*

Governor is an official for whose acts the United States is responsible.[164] The United States therefore violated the Order.

5.10 In its letter to this Court dated 15 April 1998, the United States advised that (a) Virginia had gone forward with the execution; (b) executive officials had done nothing to stop it except write a letter to the Governor "requesting" that he issue a stay; and (c) the United States Supreme Court, after having been advised by the executive that "it would be inconsistent" with United States domestic law to grant a stay pending this Court's judgment, had declined to give effect to the Order. Nevertheless, the United States advised the Court in the 15 April letter that "[t]hrough its actions, culminating in the Secretary of State's 13 April request to the Governor of Virginia to stay Mr. Breard's execution . . . , the United States took all measures lawfully at its disposal to do what the Court requested."[165]

5.11 The United States is wrong as a matter of both international law, which matters here, and United States domestic law, which does not.

5.12 Whether the federal government of the United States was constitutionally or otherwise legally restrained from ensuring compliance with the Order by Virginia officials is irrelevant to the question of the United States' compliance with that Order.

---

[164] *See, e.g.*, Eduardo Jiménez de Aréchaga, "International Responsibility," in *Manual of Public International Law* (Max Sørensen ed., 1968), pp. 531, 557; *Draft Articles on State Responsibility, Report of the International Law Commission*, United Nations, *Official Records of the General Assembly, 51st Sess., Supp. No. 10*, art. 7(1), document A/51/10 (1996); Case C-58/89, *Commission des Communautés Européenes v. République Fédérale d'Allemagne*, 1991 E.C.R. I-5019, I-5026-27 (imputing acts of Länder to Germany); *Francisco Quintanilla*, U.S.-Mex. General Claims Comm'n (16 Nov. 1926), 4 R.I.A.A. 101, 103 (imputing actions of federated state of United States to United States of America); *Francisco Mallén*, U.S.-Mex. General Claims Comm'n (27 Apr. 1927), 4 R.I.A.A. 173, 177 (same).

[165] Letter from David R. Andrews, Agent of the United States of America, to His Excellency Eduardo Valencia-Ospina, Registrar, International Court of Justice (15 Apr. 1998) (citation and internal quotation marks omitted), Annex 26.

> It is a generally accepted principle of international law that a federal state is responsible for the conduct of its political sub-divisions and cannot evade that responsibility by alleging that its constitutional powers of control over them are insufficient for it to enforce compliance with international obligations.[166]

This principle reflects the broader but equally fundamental rule that a State may not plead strictures arising from its municipal law as an excuse for its failure to comply with an international obligation.[167] From the standpoint of international law, it matters only that officials whose acts are attributable to the United States had custody of Mr. Breard and could have stopped the execution, but did not.

5.13 In any event, as a matter of United States law, federal officials could easily have stopped Virginia from carrying out the execution had they determined to do so. In the United States, the law of foreign relations is quintessentially federal, and the authority of the federal government in the area is plenary.[168] As a result, the federal

---

[166] Jiménez de Aréchaga, *op. cit.*, p. 557.

[167] Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679, art. 27; *Draft Articles on State Responsibility*, *op. cit.*, arts. 4-6; Ian Brownlie, *Principles of International Law* (1990), p. 35. *See also Free Zone of Upper Savoy & the District of Gex, Judgment, 1932, P.C.I.J., Series A/B, No. 46*, p. 35 (France not permitted to rely on own legislation to limit scope of international duty); *Greco-Bulgarian "Communities," Advisory Opinion, 1930, P.C.I.J., Series B, No. 17*, p. 32 (between treaty parties provisions of municipal law cannot prevail over treaty obligations); *Treatment of Polish Nationals in Danzig, 1932, P.C.I.J., Series A/B, No. 44*, p. 24 (State cannot use own constitution to excuse international law violations).

[168] *See* U.S. Const., art. VI, cl. 2; *United States v. Pink*, 315 U.S. 203, 231 (1942) ("the power of a State to refuse enforcement of rights [based on State policy considerations] . . . must give way before the superior Federal

(continued...)

authorities of the United States had ample means by which to ensure compliance by state officials with the international obligation imposed by this Court's Order. *First*, federal executive officials can bring suit in the courts of the United States to enforce federal law, of which the international obligations of the United States form a part.[169] *Second*, the President has broad discretion to facilitate the resolution of international disputes even acting on his own authority.[170] *Finally*, the federal courts, including the Supreme Court, have undoubted authority to enjoin state authorities from

---

168. (...continued)
policy evidenced by a treaty or international compact or agreement"); *United States v. Belmont*, 301 U.S. 324, 331 (1937) ("complete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states"); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 315-22 (1936) (because states never had sovereignty for foreign relations purposes, federal foreign relations authority is plenary); *Missouri v. Holland*, 252 U.S. 416 (1920) (upholding federal statute regulating hunting of migratory birds as implementation of treaty even on assumption that statute would be invalid in absence of treaty). *See also Restatement (Third) of the Foreign Relations Law of the United States* § 1, reporters' note 5 (1987).

[169] *See* Brief for the United States as *Amicus Curiae*, p. 15 n. 3, *Breard v. Greene*, __ U.S. __, 118 S. Ct. 1352 (1998), (citing *United States v. Arlington County* to establish "the ability of the United States to sue in order to enforce compliance with the Vienna Convention"), Annex 21; *Sanitary District v. United States*, 266 U.S. 405, 425-26 (1925) (United States has standing to bring suit against State of Illinois to "carry out treaty obligations to a foreign power"); *United States v. Arlington County*, 669 F.2d 925 (4th Cir.), *cert. denied*, 459 U.S. 801 (1982) (suit by United States to enforce bilateral international agreement and enjoin municipality from taxing property owned by foreign government); *United States v. City of Glen Cove*, 322 F. Supp. 149 (E.D.N.Y.), *aff'd on opinion below*, 450 F.2d 884 (2d Cir. 1971) (suit by United States to enforce bilateral consular convention and enjoin municipality from assessing taxes on property owned by foreign government).

[170] *See, e.g.*, *Dames & Moore v. Regan*, 453 U.S. 654 (1981) (upholding executive authority to enter into Algiers Accords settling Iranian hostage crisis and transferring claims from United States courts to Iran-United States Claims Tribunal).

enforcing a criminal conviction obtained in violation of federal law.[171] Thus, the failure of the federal executive and the federal judiciary to take any legally effective steps to halt the execution also constituted a violation of the Order.

5.14 Angel Francisco Breard was not executed by accident. The Governor of Virginia decided to go forward, and the United States Government decided to do nothing to stop him. By virtue of both Virginia's act and the federal government's refusal to act, the United States violated the Order.

---

171. *See, e.g., Kyles v. Whitley*, 514 U.S. 419 (1995) (granting defendant sentenced to death in state court proceeding new trial on petition for *habeas corpus* under 28 U.S.C. § 2254 on grounds that state prosecutors withheld evidence); *Felker v. Turpin*, 518 U.S. 651 (1996) (holding that recent amendment to the *habeas corpus* statute (Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1217) does not preclude Supreme Court from entertaining an application for relief under statute); All Writs Act, 28 U.S.C. § 1651 (providing that the "Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law"); *Habeas Corpus* Statute, 28 U.S.C. § 2254 (providing that the "Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or law or treaties of the United States"); *see also Missouri v. Jenkins*, 495 U.S. 33, 57 (1990) (federal court may enjoin municipality to levy taxes to comply with desegregation order, even when levy would contravene state law); *Asakura v. Seattle*, 265 U.S. 332 (1924) (enjoining enforcement of municipal ordinance in violation of treaty); *French v. Hay*, 89 U.S. (22 Wall.) 250 (1874) (federal court may enjoin enforcement of state judgment entered in violation of federal law); *cf.* Va. Stat. Ann. § 53.1-232(D) (Virginia Director of Corrections must respect a stay of execution issued by any court of competent jurisdiction), Annex 10.

II.

The Order of Provisional Measures Was Binding on the United States

5.15 In opposing Paraguay's requests to the United States Supreme Court that it give effect to the Order by stopping the execution, the United States advised the court that an indication of provisional measures pursuant to Article 41 was not binding as a matter of international law.[172] "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose."[173] As a matter of the ordinary meaning of Article 41 in its context, no less than its evident object and purpose, the United States is wrong.

---

[172] Brief for the United States as *Amicus Curiae*, *op. cit.*, pp. 49-51. The Court has never squarely addressed the question whether orders indicating provisional measures create binding obligations. *See Application of the Convention on the Prevention and Punishment of Genocide, Provisional Measures, Order of 13 September 1993, I.C.J. Reports 1993*, p. 384 (separate opinion of Judge Weeramantry); *ibid.*, p. 399 (separate opinion of Judge Ajibola); Shigeru Oda, "Provisional Measures: the Practice of the International Court of Justice," in *Fifty Years of the International Court of Justice: Essays in Honor of Sir Robert Jennings* (Vaughan Lowe & Malgosia Fitzmaurice eds., 1996), pp. 541, 555 ("[t]he Court has never taken an overt position [on the binding nature of provisional measures] but, as a matter of principle, the Court's Order ought to be properly observed").

[173] Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679, art. 31. Articles 31 and 32 of the Vienna Convention on the Law of Treaties reflect customary international law. *See, e.g.*, Olivier Corten, *L'utilisation du "raisonnable" par le juge international* (1997), p. 34 (collecting cases and doctrine).

A. ARTICLE 94(1) OF THE CHARTER REQUIRES THE PARTIES TO COMPLY WITH AN INDICATION OF PROVISIONAL MEASURES

5.16 Article 94(1) of the United Nations Charter obligates the signatories "to comply with the *decision* of the International Court of Justice in any case to which it is a party."[174] Given the judicial means by which the Court resolves a request for an order of provisional measures, it qualifies easily, as a matter of the ordinary meaning of the term, as a "decision" of the Court subject to Article 94(1).[175]

5.17 The United States expressly recognized the breadth of the obligation set forth in Article 94(1) after Iran failed to comply with the Court's indication of provisional measures in *United States Diplomatic and Consular Staff in Tehran*. At that time, the United States stated:

> Iran had formally undertaken, pursuant to Article 94, paragraph 1, of the Charter of the United Nations, to comply with the decision of the Court in any case to which Iran might be a party. Accordingly it was the

---

[174] U.N. Charter, art. 94(1) (emphasis supplied).

[175] *See, e.g.*, Edvard Hambro, "The Binding Character of the Provisional Measures of Protection Indicated by the International Court of Justice," in *Rechtsfragen der Internationalen Organisation* (Walter Schätzel & Hans-Jürgen Schlochauer, eds., 1956), pp. 152, 168-69; *Application of the Convention on the Prevention of the Crime of Genocide, Order of 13 September 1993, I.C.J. Reports 1993*, pp. 383-84 (separate opinion of Judge Weeramantry). *See also* ICJ Rules, art. 74(2) ("The Court, if it is not sitting when the request [for provisional measures] is made, shall be convened forthwith for the purpose of proceeding to a *decision* on the request as a matter of urgency.") (emphasis added); art. 76 (1) (Court has authority to "revoke or modify any *decision* concerning provisional measures") (emphasis added); art. 76(3) (requiring Court to provide parties an opportunity to be heard "[b]efore taking any *decision* under paragraph 1") (emphasis added); art. 77 (requiring transmission of "any *decision* taken by the Court under Article 76, paragraph 1 . . . to the Secretary-General . . .") (emphasis added).

> hope and expectation of the Government of the United States that the Government of Iran, in compliance with its formal commitments and obligations, would obey any and all Orders and Judgments which might be entered by the Court in the course of the present litigation.[176]

As the United States recognized, the obligation to comply imposed by Article 94(1) covers "all Orders and Judgments" of this Court, including an indication of provisional measures.[177]

B. THE ORDINARY MEANING OF ARTICLE 41 IN ITS CONTEXT ESTABLISHES THAT AN INDICATION OF PROVISIONAL MEASURES IS BINDING

5.18 Even without reference to Article 94(1) of the Charter, the ordinary meaning of Article 41(1) in its context makes it clear that an indication of provisional measures is binding.

5.19 The Court's Statute is authentic, and equally authoritative, in English, French, Spanish, Russian, and Chinese.[178]

5.20 The English text of Article 41 provides:

> 1. The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party.

---

[176] *Oral Argument, United States Diplomatic and Consular Staff in Tehran, I.C.J. Pleadings 1980*, p. 266 (statement of Roberts Owen).

[177] *See also* Jean Combacau & Serge Sur, *Droit international public* (1997), p. 599.

[178] *See* U.N. Charter, arts. 92, 111; Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679, art. 33(1).

> 2. Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and to the Security Council.

The French text of Article 41 provides:

> 1. La Cour a le pouvoir d'indiquer, si elle estime que les circonstances l'exigent, quelles mesures conservatoires du droit de chacun doivent être prises à titre provisoire.
>
> 2. En attendant l'arrêt définitif, l'indication de ces mesures est immédiatement notifiée aux parties et au Conseil de sécurité.

5.21 The context of Article 41 is (a) the Charter insofar as it deals with the Court and (b) the Statute of the Court read as a whole.[179] By virtue of the Charter, the Court is "the principal *judicial* organ of the United Nations."[180] The Statute provides that the "function" of the Court is "to decide in accordance with international law such disputes as are submitted to it."[181] The procedures the Court employs — whether on the merits, on an application for an order of provisional measures, or on any other application by a party before it — are judicial in character: the Court receives pleadings; it hears the parties through oral and written submissions; and it deliberates, votes, and renders an order or judgment.

5.22 Hence, to state the obvious, the context in which Article 41 must be read is a treaty that constitutes the statute of a *court*. The terms that appear there must therefore be read in light of the judicial function with which the Court is charged.

---

[179] Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679, art. 31(2).

[180] U.N. Charter, art. 92 (emphasis supplied); *see* I.C.J. Statute art. 1.

[181] I.C.J. Statute, art. 38(1).

1. *The English Text of Article 41(1)*

5.23 Some commentators have opined that the French and English texts of Article 41(1) diverge in respects material to the question whether an indication of provisional measures is binding.[182] It appears to be generally agreed that *if* there is a discrepancy (which is by no means generally agreed), the English text less clearly supports the binding character of provisional measures.[183]

5.24 Properly viewed, however, "in the[] context" of the Statute as a whole — that is, as a provision defining the authority of a judicial body — the English text of Article 41 admits only of an interpretation that provisional measures are binding. If even the English text admits only of that interpretation, there can be little question that the Article must be so read.

a. "The Court shall have the power . . ."

5.25 The ordinary meaning of the term "power" connotes the capability to demand compliance.[184] When it is considered that it is the "power" of a *court* that is under consideration, the connotation of an obligation to comply becomes compelling.

---

[182] *See* Henri-A. Rolin, "Force obligatoire des ordonnances de la Cour permanente de Justice internationale en matière de mesures conservatrices," in *Mélanges offerts à Ernest Mahaim* (1935), pp. 280, 281 ("La discordance est flagrante."); Jerzy Sztucki, *Interim Measures in the Hague Court: An Attempt at Scrutiny* (1983), p. 263 ("There is a clear discrepancy between the French and the English text of Article 41.").

[183] *See, e.g.*, Jerzy Sztucki, *op. cit.*, p. 263.

[184] *E.g.*, *Cassell's New English Dictionary* (2d ed. 1920), p. 833 (defining "power" as the "[a]bility to do or act so as to effect something; . . . strength, force, energy, esp. as actually exerted; influence, dominion, authority (over); right or ability to control; legal authority or authorization"); *Oxford English Dictionary: A New English Dictionary on Historical Principles*, Vol. VII (1908), p. 1213 (defining "power" as the "1. Ability to do or effect something or anything, or to act upon a person or thing . . . . 2. Ability to act or affect something strongly; physical or mental strength; might; vigour, energy; force of character; telling force, effect . . . . 4. Possession of control or command over others; dominion, rule; government,
(continued...)

5.26 If an indication of provisional measures does not constitute a binding order of the Court, it must have some other function, as the Statute should not be read to include meaningless provisions.[185] If an indication of provisional measures is not binding, it must constitute only an appeal to the "moral" sense of the parties. But any such moral exhortation would be inconsistent with the function of the Court:

> It cannot be lightly assumed that the Statute of the Court — a legal instrument — contains provisions relating to any merely moral obligations of States and that the Court weighs minutely the circumstances which permit it to issue what is no more than an appeal to the moral sense of the parties.[186]

---

184. (...continued)
domination, sway, command; control, influence, authority . . . . b. Authority given or committed; hence, sometimes, liberty or permission to act. . . . c. The limits within which administrative power is exercised . . . . 5. Legal ability, capacity, or authority to act; esp. delegated authority; authorization, commission, faculty; spec. legal authority vested in a person or persons in a particular capacity.").

[185] *See* Jacque Dehaussy & Mahmoud Salem, "Sources du droit international: Les traités. Interprétation," 1 *Juris classeur de droit international*, Fascicule 12-6 (1995), p. 18 (describing *effet utile* as "*un principe fondamental*" of public international law); Jean Combacau & Serge Sur, *op. cit.*, p. 175 ("Concrètement, entre deux interprétations, on retiendra celle qui donne un sens à chacun des termes, c'est-à-dire leur effet utile, ce qui est le sens exact de la maxime *ut res magis valeat quam pereat*."). *See also* Olivier Corten, *op. cit.*, pp. 42-43 (1997) ("Le «raisonnable» se retrouve plus explicitement dans un moyen d'interprétation consistant à donner toute sa portée à l'objet et au but d'une disposition, celui dit de l'«*effet utile*».").

[186] Sir Hersch Lauterpacht, *The Development of International Law by the International Court* (1958), p. 254.

Put another way,

> [o]n peut ajouter que si le statut prend soin d'accorder expressément en cette matière un *pouvoir* à la Cour, c'est là l'affirmation d'une compétence normale qui doit sauf indication contraire s'exercer par la voie de décisions obligatoires pour les Parties.[187]

5.27 Indeed, the Court has previously cautioned that in exercising its judicial authority, it must act to ensure the observance of the inherent limitations on the exercise of the judicial function, and to "maintain [the Court's] judicial character."[188] Hence, among other things, the Court could not "give a judgment which would be dependent for its validity on the subsequent approval of the parties."[189] Instead, the Court may act only where its judgment will "have some practical consequence in the sense that it can *affect existing legal rights or obligations of the parties*, thus removing uncertainty from their legal relations."[190]

5.28 A nonbinding indication of provisional measures would "depend[] for its validity on the subsequent approval" of one of the parties; it would not "affect existing legal rights and obligations." It therefore would not partake of the Court's "judicial character." The status of the Court as a court requires that the "power" accorded by Article 41(1) be read to invoke a legal obligation to comply.

---

[187] Henri-A. Rolin, *op. cit.*, pp. 280, 281 (emphasis in original).

[188] *Northern Cameroons, Judgment, I.C.J. Reports 1963*, p. 29; *see also Nuclear Tests (Australia v. France), Application for Permission to Intervene, Order of 20 December 1974, I.C.J. Reports 1974*, p. 259.

[189] *Northern Cameroons, Judgment, I.C.J. Reports 1963*, p. 29 (internal quotations omitted).

[190] *Ibid.*, pp. 33-34 (emphasis supplied).

b. ". . . to indicate . . ."

5.29 The power "to indicate" provisional measures reinforces the Court's judicial function. "[T]he word 'indicate' expresses exactly the Court's function, which is to *point out* what the parties must do in order to remain in harmony with what the Court holds to be the law."[191] Thus, the use of the term "indicate" as a matter of diplomatic politesse cannot detract from the authority attaching to the indication:

> The term *indicate*, borrowed from treaties concluded by the United States with China and France on September 15, 1914, and with Sweden on October 13, 1914, possesses a diplomatic flavor, being designed to avoid offense to the susceptibilities of states. It may have been due to a certain timidity of the draftsmen. Yet it is not less definite than the term *order* would have been, and it would seem to have as much effect. The use of the term does not attenuate the obligation of a party within whose power the matter lies to carry out the measures which ought to be taken. An indication by the Court under Article 41 is equivalent to a declaration of obligation contained in a judgment, and it ought to be regarded as carrying the same force and effect.[192]

---

[191] Edward Dumbauld, *Interim Measures of Protection in International Controversies* (1932), p. 169 (emphasis in original). *See also* Roger Pinto, "Cour internationale de Justice; Procédure," 4 *Juris-classeur de droit international*, Fascicule 217 (1980), p. 14 (stating, with specific regard to provisional measures, "les ordonnances de la Cour n'ont pas le caractère de simples recommendations. Ce sont des décisions judiciaires. A ce titre elles sont obligatoires pour les parties.").

[192] Manley O. Hudson, *The Permanent Court of International Justice, 1920-1942* (1943), pp. 425-26 (emphasis in original) (footnotes omitted) (internal quotation marks omitted). *See* V.S. Mani, "Interim Measures of Protection: Article 41 of the I.C.J. Statute and Article 94 of the UN Charter," *Indian J. Int'l L.*, Vol. 10 (1970), pp. 359, 365 ("The term 'indicate' was employed by the Advisory Committee of Jurists of 1920, not

(continued...)

In context, the term "indicate," too, connotes a legal obligation to comply.

c. ". . . if it considers that the circumstances so require . . ."

5.30 The Court responds to an application for an order of provisional measures by "considering" whether the legal and factual circumstances "require" the order. Again, the Court performs a judicial function. If, after performing this function, the Court determines that an indication of provisional measures is "required," it is hard to see how the adverse party, having been given the opportunity to be heard, would not be "required" to comply with the indication.

d. ". . . any provisional measures which ought to be taken to preserve the respective rights of either party."

5.31 "The word 'ought' carries the connotation of an obligation . . . ."[193] When used in the context of a court, it can plausibly carry no other connotation.

---

192. (...continued)
because the Committee did not want to clothe the Court with a power of issuing an order which would be binding upon the parties to a case, but because of diplomatic precedent.") (footnotes omitted); *see also* C.H. Crockett, "The Effects of Interim Measures of Protection in the International Court of Justice," *Cal. W. Int'l L.J.*, Vol. 7 (1977), pp. 348, 354 ("In diplomacy, if a choice is presented, the phrase or term carrying the least onerous connotation is usually chosen so long as that choice accommodates the parties' intentions.").

[193] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 13 September 1993, I.C.J. Reports 1993*, p. 380 (separate opinion of Judge Weeramantry).

5.32 The reference to the parties' "rights" compels the same conclusion. The concept of a legal right necessarily implies a corresponding legal duty.[194]

5.33 The object and purpose of provisional measures, "to preserve the respective rights of either party," is addressed below. Examining here only the context in which the terms "ought" and "rights" appear, it suffices to observe that courts are simply not in the business of making moral pronouncements or of providing gentle reminders of a State's legal obligations; they are charged to decide cases in a manner that vindicates legal rights.

5.34 In sum, read in the context of Article 92 of the Charter and of the Statute as a whole, the English text of Article 41(1) cannot bear an interpretation that strips an indication of provisional measures of legal force.

2. *The Other Authentic Texts of Article 41(1)*

5.35 The French, Spanish, Russian, and Chinese texts of Article 41(1) strengthen the conclusion that an indication of provisional measures is binding. In at least two respects, the ambiguity perceived by some in the English text does not appear in the French counterpart, and the Spanish, Russian, and Chinese accord with the French. For convenience, we refer to the French.[195]

---

[194] *See, e.g.*, Jerome B. Elkind, *Interim Protection: A Functional Approach* (1981), p. 153.

[195] The Spanish, Russian, and Chinese texts of Article 41(1) read as follows:

> 1. La Corte tendrá facultad para indicar, si considera que las circunstancias así lo exigen, las medidas provisionales que deban tomarse para resguardar los derechos de cada una de las partes.

> 1. Суд имеет право указать, если, по его мнению, это требуется обстоятельствами, любые временные меры,

(continued...)

5.36 *First*, the phrase "power to indicate" is derived from "*pouvoir d'indiquer*." While "indicate," particularly in a judicial context, carries the force of obligation, "*indiquer*" is even less susceptible of a merely precatory dimension.[196]

5.37 *Second*, the French "*doivent*" admits of a more limited range of meaning than the English "ought." The French "*doivent*" is generally translated as "must" and used to denote mandatory obligations.[197] For example, in Article 40(1) of the Statute, the phrase "*doivent être indiqués*" is rendered in English as "shall be indicated," and in Article 43(4), "*doit être communiquée*" as "shall be communicated."[198] Thus, "*doivent*" accords with the principal

---

195. (...continued)

которые должны быть приняты для обеспечения прав
каждой из сторон.

一．法院如認情形有必要時，有權指示當事國應行
遵守以保全彼此權利之臨時辦法。

[196] *See Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 13 September 1993, I.C.J. Reports 1993*, p. 380 (separate opinion by Judge Weeramantry) ("the French word '*indiquer*' probably goes even further in this direction [of creating a connotation of obligation] than the English word 'indicate'"). *See also Petit Larousse illustré* (1919), p. 502 (defining "*indiquer*" to mean "montrer, désigner une personne ou une chose. Enseigner à quelqu'un ce qu'il cherche.").

[197] *See Petit Robert dictionnaire alphabetique et analogique de la langue française*, Tome I (1990), p. 531 (defining "*devoir*", when followed by an infinitive, to mean "[ê]tre dans l'obligation de (faire qqch.) . . . cf. Être tenu, obligé de; il faut."); Gérard Cornu, *Linguistique juridique* (1990), p. 267 ("Certains verbes, en petit nombre, expriment la contrainte. . . . Le noyau [de ces verbes] comprend les termes: devoir . . . ."). *See also* Jerzy Sztucki, *op. cit.*, pp. 263-64.

[198] *See also* U.N. Charter, art. 2 ("doivent agir conformément" rendered as "shall act in accordance with"); *ibid.*, art. 2(2) ("doivent remplir" rendered as "shall fulfill"); *ibid.*, art. 12(1) ("ne doit faire aucune" rendered as "shall not make any").

definition of "ought" in English, indicating obligation and duty, but it does not admit of advisability and prudence.[199]

5.38 In the face of this divergence, if divergence there be, the Court must adopt the reading that corresponds to the band of meaning that is common to both texts, rather than choose a meaning that can be reconciled only with one of the two. As the Permanent Court explained,

> where two versions possessing equal authority exist one of which appears to have a wider bearing than the other, [the Court] is bound to adopt the more limited interpretation which can be made to harmonize with both versions and which, as far as it goes, is doubtless in accordance with the common intention of the Parties.[200]

In other words, hypothesizing a divergence for purposes of argument, if the French text allows only an imperative reading, and the English permits both an imperative and a permissive one, then the imperative reading is "the meaning which best reconciles the texts."[201] Applying that principle here, Article 41(1) must be read to empower the Court to issue binding orders.

3. Article 41(2)

5.39 In its brief to the United States Supreme Court, the United States made much of the formulation "measures suggested" in

---

199. *See* Jerzy Sztucki, *op. cit.*, p. 263 ("The French phrase *'doivent être prises'* which points to *devoir* (duty) is stronger than the corresponding English phrase 'ought to be taken'.").

200. *Mavrommatis Palestine Concessions Case, Judgment No. 2, 1924, P.C.I.J., Series A*, p. 19.

201. Vienna Conventions on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679, art. 33(4).

the second paragraph of the English text of Article 41.[202] However, none of the other authentic texts uses a term equivalent to "suggested" in Article 41(2); each uses a term equivalent to "indicated." Emphasis supplied, the non-English texts read, respectively:

> 2. En attendant l'arrêt définitif, *l'indication de ces mesures* est immédiatement notifiée aux parties et au Conseil de sécurité.
>
> 2. Mientras se pronuncia el fallo, se notificarán inmediatamente a las partes y al Consejo de Seguridad las *medidas indicadas*.
>
> 2. Впре ь о окончания решения сооб ение *о предлагаемых мерах* неме ленно ово ится о све ения сторон и Совета Безопасности.
>
> 二．在終局判決前，應將*此項指示辦法*立即通知各當事國及安全理事會。

Hence, as the commentators agree, the use of "suggested" in the English text of Article 41(2) cannot be read to change the meaning of Article 41(1).[203]

---

[202] Brief for the United States as *Amicus Curiae*, *op. cit.*, p. 49.

[203] *See* Manley O. Hudson, *op. cit.*, p. 425 n. 18 ("Little significance is to be attached to the phrase 'measures suggested' in paragraph 2 of Article 41, no equivalent of which appears in the French version."); Eckhard Hellbeck, "Provisional Measures of the International Court of Justice — Are They Binding?," *A.S.L.I.S. Int'l L. J.*, Vol. 9 (1985), pp. 169, 171 (similar); *see also* Taslim O. Elias, *The International Court of Justice and Some Contemporary Problems* (1983), p. 79 (similar).

C. THE OBJECT AND PURPOSE OF BOTH ARTICLE 41 STANDING ALONE AND THE STATUTE OF THE COURT TAKEN AS A WHOLE REQUIRE THAT PROVISIONAL MEASURES BE BINDING

5.40 The terms of Article 41 must be interpreted not only "in their context," but "in light of its object and purpose." In addition, if the meaning of an international instrument differs between two official texts — if, for example, the French and English texts of Article 41(1) are read to diverge — resort to object and purpose may be had in order to reconcile the texts.[204]

5.41 The object and purpose of Article 41(1) is "to preserve the respective rights of either party" pending resolution of the merits of the dispute. The object and purpose of the Statute as a whole is to allow the peaceful resolution of disputes in accordance with international law. As this case illustrates, these objects and purposes can only be achieved if an indication of provisional measures binds the parties to the case before the Court.

1. A Nonbinding Indication of Provisional Measures Cannot Preserve the Rights of the Requesting Party

5.42 Under Article 94(1) of the Charter, each Member of the United Nations "undertakes to comply" with any decision of the Court to which it is a party.[205] In its Order of Provisional Measures in this case, the Court explained that its power "to indicate provisional measures . . . is intended to preserve the respective rights of the parties pending its decision . . . ." Hence, the Court further explained, it "will not order interim measures in the absence of 'irreparable prejudice . . . to rights which are the subject of dispute . . . .'"

---

[204] Vienna Conventions on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679, art. 33(4); *see also Restatement (Third) of Foreign Relations Law of the United States* § 325, cmt. f (1987).

[205] *See also* I.C.J. Statute, art. 59.

5.43 Here, the Court determined that the execution of Mr. Breard on the scheduled date "would render it impossible for the Court to order the relief that Paraguay seeks and thus cause irreparable harm to the rights it claims." Given that determination, the Court concluded that "the circumstances require[d] it to indicate . . . provisional measures."

5.44 In disregard of the Order, the execution of Mr. Breard went forward. As the Court predicted, the execution has "render[ed] it impossible for the Court to order the relief Paraguay seeks."

5.45 Either the execution was unlawful as a breach of a binding international obligation, or an indication of provisional measures cannot possibly achieve the object Article 41 purports to seek:

> [C]learly, there would be no point in making the final [judgment] binding if one of the parties could frustrate that decision in advance by actions which would render the final judgment nugatory. It is, therefore, a necessary consequence . . . of the bindingness of the final decision that the interim measures intended to preserve its efficacy should be equally binding.[206]

---

[206] United Nations, *Official Records of the Security Council, Sixth Session, 559th Meeting*, p. 20, document S/PV. 559 (1951) (statement of Sir Gladwyn Jebb, Representative of the United Kingdom). *See, e.g.*, Abdelhamid El Ouali, *Effets juridiques de la sentence internationale* (1984), pp. 99-100 (provisional measures "doivent trouver le fondement de leur force juridique essentiellement dans leur raison d'être"; "En reconnaissant au juge international le pouvoir d'indiquer ces mesures, on doit lui reconnaître par là-même implicitement le droit de les imposer aux Etats."); E.K. Nantwi, *The Enforcement of International Judicial Decisions and Arbitral Awards in Public International Law* (1966), p. 153 ("provision that the final judgment is binding becomes pointless if the decision can be negatived by actions of one of the parties in advance of the judgment"); Alan W. Ford, *The Anglo-Iranian Oil Dispute of 1951-1952* (1954), p. 93 ("a provision that the final decision (judgment) is binding becomes pointless if that decision can be negated by the actions of one party in advance of judgment"); Julius Stone, *Legal Controls of International*

(continued...)

Indeed,

> [t]he whole logic of the jurisdiction to indicate interim measures entails that, when indicated, they are binding — for this jurisdiction is based on the absolute necessity, when the circumstances call for it, of being able to preserve, and to avoid prejudice to, the rights of the parties, as determined by the final judgement of the Court.[207]

The only way to vindicate the Court's authority to preserve the rights of the parties pending its final judgment is to recognize the binding character of any provisional measures the Court indicates.

2. *A Nonbinding Indication of Provisional Measures Cannot Preserve the Court's Ability to Resolve Disputes in Accordance with Law*

5.46 This Court was "established by the Charter of the United Nations as the principal judicial organ of the United Nations."[208] In other words, this Court contributes to the United Nations' mission of

---

206. (...continued)
Conflicts (1954), p. 132 (Court's indications of provisional measures must be binding because "any other arrangement might leave an unscrupulous defendant legally free to produce a *fait accompli* during time gained by a dilatory plea to the jurisdiction").

[207] Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice* (1986), p. 548 (footnote omitted). *See Application of the Convention on the Prevention and Punishment of Genocide, Provisional Measures, Order of 13 September 1993, I.C.J. Reports 1993*, p. 399 (separate opinion of Judge Ajibola) ("Logic and common sense would consider it ridiculous and absurd for the Court to be unable to preserve the rights of the parties pending final judgment."). *Cf.* Sir Gerald Fitzmaurice, *op. cit.*, p. 548 n. 3 (if provisional measures orders were not binding, they would "*in practice*, have a lesser status than that of other interlocutory orders of far smaller importance . . . .") (emphasis in original).

[208] I.C.J. Statute, art. 1; *see* U.N. Charter, art. 92.

promoting the peaceful resolution of disputes and ensuring compliance with international law by providing a judicial forum in which international law may be impartially applied to such disputes as States have consented to submit.[209]

5.47 By arguing against the binding character of provisional measures, the United States effectively contends that a party that has consented to the judicial resolution of a given dispute retains the right to determine whether or not to comply with an order of the tribunal even when that order is intended to preserve the tribunal's capacity to render an effective judgment in the dispute. That contention cannot be squared with the object and purpose of judicial resolution of disputes in accordance with international law.[210]

5.48 The Governor's conduct in this case demonstrates the stark incompatibility between the Statute's purpose to facilitate the judicial resolution of disputes and the notion that an indication of provisional measures is not binding. Advised that he was under no obligation to abide by the Order, but knowing that he would have an obligation to abide by a final judgment, Governor Gilmore determined to go forward with the execution now so that he would not be foreclosed from doing so later. While Governor Gilmore's action may, by his own lights, have been a rational response to the United States' position, any legal regime that would induce such a response to an order granting conservatory measures would be thoroughly irrational.

5.49 When parties agree to submit a dispute to a court, they consent to the resolution of the dispute by an impartial body in accordance with established legal standards. By making that submission, they necessarily waive their right to resolve the dispute by unilateral action. As a result, the Court has repeatedly pointed out that its authority under Article 41 "presupposes" that "the Court's judgment should not be anticipated by reason of any initiative regarding the measures which are in issue."[211] Any other rule would effectively allow a party to oust the Court of its jurisdiction over the subject matter of a dispute after the dispute has arisen, thereby rendering meaningless the obligation undertaken by the compromissory agreement.

---

[209] *See* U.N. Charter, art. 1(1).

[210] *See* Manley O. Hudson, *op. cit.*, p. 426 ("The judicial process which is entrusted to the Court includes as one of its features, indeed as one of its essential features, th[e] power to indicate provisional measures which ought to be taken.").

5.50 Hence, a court, to function in conformity with its judicial character, must have the authority to control the resolution of the dispute by excluding unsanctioned nonjudicial action:

> The function of a judicial tribunal, once an issue has been brought to it, is to take the necessary steps according to law towards reaching a decision in accordance with the principle of the equality of parties. This presupposes that the issue brought to it, once committed to the court, must as far as possible be preserved in that form, free of interference by unilateral action of a party, until the determination made by the court. It means also that the principle of equality cannot be disturbed by the superior force available to one party, wherewith to impair or interfere with the subject-matter until determination. It is thus inherent in the authority of that tribunal that, ancillary to the power of judgment, it must have the power to issue incidental orders to ensure that the subject-matter of the suit is preserved intact until judgment.[212]

---

[211] *Fisheries Jurisdiction, (Federal Republic of Germany v. Iceland), Interim Protection, Order of 17 August 1972, I.C.J. Reports 1972*, p. 34. *See also Aegean Sea Continental Shelf, Interim Protection, Order of 11 September 1976, I.C.J. Reports 1976*, p. 9 (Article 41 power presupposes that "the Court's judgment[s] should not be anticipated by reason of any initiative regarding matters in issue before the Court").

[212] *Application of the Convention on the Prevention and Punishment of Genocide, Provisional Measures, Order of 13 September 1993, I.C.J. Reports 1993*, p. 376 (separate opinion of Judge Weeramantry); *see also* Moncef Khdir, *Dictionnaire juridique de la Cour internationale de Justice*

(continued...)

In short, once having agreed to submit a dispute to this Court, a party does not have the right to act unilaterally on the dispute in the manner of the United States here.[213]

D. THE INTERPRETATION OF ARTICLE 41 MUST ALSO TAKE INTO ACCOUNT THE RULE THAT THE PARTIES TO A JUDICIAL PROCEEDING HAVE AN OBLIGATION TO PRESERVE THE SUBJECT MATTER

5.51 The interpretation of Article 41 must also take into account any "relevant rules of international law applicable in the

---

212. (...continued)
(1997), p. 139 (defining "ordonnance" as "Terme employé pour désigner une décision prise par la cour ou par son Président, et dont l'objet est de régler un point de procédure, sans se prononcer sur le fond de l'affaire, notamment en matière de mesures conservatoires . . . . Les ordonnances ont un caractère obligatoire"); *ibid.*, p. 124 ("[les mesures conservatoires] ont force obligatoire au même titre que les arrêts de la cour.").

[213] *See* Edvard Hambro, *op. cit.*, pp. 164-65 ("It is in the very essence of the Court that its decisions must be binding. It is against the function of the Court and against the dignity of the Court (not the dignity in the sense of protocol or prestige, but dignity of the Court as the embodiment of the majesty of law) to render decisions which the Parties are free to accept or to ignore at their will."); Jerome B. Elkind, *op. cit.*, p. 30 (power to indicate provisional measures is "part and parcel of the idea of law in the sense that law is a substitute for violence. A party who cannot rely on the courts for a just solution of his dispute may well recur to the more primitive remedy of self-help. Nowhere is this problem more glaring than in a situation where the other party has anticipated the judgment of the court and has performed an action which would make that judgment valueless."); Edward Dumbauld, *op. cit.*, p. 167 ("[T]he Court may forbid acts of self-help and hostilities to the extent that such conduct interferes with the Court's functioning or jeopardizes the functioning of its judgment."); Lawrence Collins, "Provisional and Protective Measures in International Litigation," in *Recueil des Cours*, Tome 234, 1992-III (1993), p. 23 ("[T]here are historical grounds for seeing [the] origin [of provisional and protective measures] in the desire of those administering the law to prevent violent self-help . . . .").

relations between the parties."[214] The rule applicable here is that, quite apart from any conventional obligation, a party that has agreed to submit a dispute for judicial resolution may not act on the subject matter of the dispute in a manner that interferes with the capacity of the tribunal to render an effective judgment.

5.52 The Permanent Court has confirmed that the authority to indicate provisional measures pursuant to Article 41 simply reflects

> the principle universally accepted by international tribunals . . . to the effect that the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given and, in general, not allow any step of any kind to be taken which might aggravate or extend the dispute.[215]

Thus, in exercising its authority under Article 41, the Court "give[s] life and blood to a rule that already exists in principle."[216]

---

[214] Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679, art. 31(3)(c).

[215] *Electric Company of Sofia and Bulgaria, Judgment, 1939, P.C.I.J., Series A/B, No. 77*, p. 199.

[216] Edvard Hambro, *op. cit.*, p. 167. *See, e.g., Comité des juristes de l'étude du statut de la Cour Permanente de Justice Internationale* (First Session, 11 March 1929) (statement of Elihu Root) ("parties to a case, when they submitted their controversy to the Court, might be regarded as having come under an obligation not to destroy the subject matter of their controversy or in any way to anticipate the judgment of the Court by action of their own;" "[s]uch an obligation was implied in their acceptance of the jurisdiction of the Court") (unofficial translation); Henri-A. Rolin, *op. cit.*, p. 295 ("Une première proposition qui ne nous paraît pas susceptible de contradiction . . . est que toute soumission de justiciables à une juridiction . . . implique l'obligation de s'abstenir en cours d'instance de tout acte susceptible soit de contrarier le fonctionnement du Tribunal, soit de paralyser éventuellement l'efficacité de sa décision.").

5.53 This principle of restraint is a rule of customary international law.[217] It is fundamental that "from the moment that, and as long as, a dispute is submitted to a judicial decision and one is awaited, the parties to the dispute are under an obligation to refrain from any act or omission the specific factual characteristics of which would render the normative decision superfluous or impossible."[218] Thus, even absent Article 41, "it is perfectly certain that all States parties to an international dispute *sub judice* have an absolute obligation to abstain from any act that would nullify the result of the judgment to be rendered by the international court in question."[219]

5.54 This principle of restraint should inform the interpretation of Article 41. Specifically, Article 41 should be read to harmonize a party's preexisting obligation not to irrevocably alter the subject matter of the dispute with the Court's express authority to define the scope of that obligation in the circumstances of a particular dispute. Read in that light, an order pursuant to Article 41 must be binding.

---

[217] Peter J. Goldsworthy, "Interim Measures of Protection in the International Court of Justice," *Am. J. Int'l L.*, Vol. 68 (1974), pp. 258, 260 ("The practice of states reveals acceptance of a general obligation to maintain the status quo pending a final decision in a dispute."). *See, e.g.*, General Assembly Resolution 2625, *United Nations Declaration of Principles of International Law Concerning Friendly Relations and Cooperation Among Nations in Accordance with the Charter of the United Nations*, reprinted in 9 I.L.M. 1292 (1970).

[218] Niemeyer, *Einstweilige Verfügungen des Weltgerichtshofs, ihr Wesen und ihre Grenzen* (1932), pp. 15-16 (quoted and translated in *Application of the Convention on the Prevention of Genocide, Provisional Measures, Order of 13 September 1993, I.C.J. Reports 1993*, p. 378 (separate opinion of Judge Weeramantry)). *See, e.g.*, Manley O. Hudson, *op. cit.*, p. 426 ("If a State has accepted the general office of the Court . . . it has admitted the powers which are included in the judicial process entrusted to the Court. It would seem to follow that such a State is under an obligation to respect the Court's indication of provisional measures . . . ."); Jerome B. Elkind, *op. cit.*, pp. 162-63 ("[t]he duty of the parties not to prejudice the outcome of a judicial dispute pending the final decision of the Court can be[] seen as a duty arising from the fact that judicial proceedings have been instituted").

[219] Edvard Hambro, *op cit.*, p. 167. *See Application of the Convention on the Prevention of Genocide. Order of 13 September 1993, I.C.J. Reports 1993*, p. 377 (separate opinion of Judge Weeramantry) (citing Hambro with approval on this point).

E. THE CIRCUMSTANCES OF THE ADOPTION OF ARTICLE 41 CONFIRM THAT AN INDICATION OF PROVISIONAL MEASURES IS BINDING

5.55 "[T]he preparatory work of the treaty and the circumstances of its conclusion" may provide a "supplementary means of interpretation."[220] Such means may be used (a) to confirm an interpretation reached by the general rule that a treaty shall be construed to accord with the ordinary meaning of the text in its context and in the light of its purpose; (b) to resolve a meaning that is "ambiguous or obscure;" or (c) to reconsider a reading that appears "manifestly absurd or unreasonable."[221] It follows that the supplementary means cannot be used to overturn an interpretation dictated by the general rule.

5.56 In the case of Article 41, there is no reason to have recourse to the supplementary means, as the ordinary meaning, context, and object and purpose of the provision establish a clear, unambiguous, and eminently reasonable reading. But if recourse were to be had, the supplementary means would only confirm the binding character of an indication of provisional measures.

5.57 What is now Article 41 of this Court's Statute first appeared as the like-numbered article of the Statute of the Permanent Court of International Justice. The original draft of that Statute was prepared by an Advisory Committee of Jurists that was appointed by the League of Nations and met in 1920. The League's Secretariat prepared a preparatory memorandum,[222] but the Advisory Committee based the provision on language employed in the Bryan Treaties between the United States and Sweden, France, and China, respectively.[223] The Statute was adopted by the Assembly of the League of Nations on 13 December 1920.

---

[220] Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679, art. 32.

[221] *Ibid.*

5.58 The Statute of this Court was drafted by a Committee of Jurists convened in Washington in 1945. The Committee adopted Article 41 from the Statute of the Permanent Court without recorded discussion and with only two minor changes.[224] This Court's Statute was unanimously approved, without discussion of Article 41, at the San Francisco Conference later in 1945.[225] Thus, if any preparatory work or adoption history might shed light, it must be that preceding the adoption of the Statute of the Permanent Court.

5.59 The circumstances surrounding the adoption of that Statute by the Assembly of the League of Nations provide strong support for the conclusion that an indication of provisional measures is binding. Before a final vote on the Statute, the Advisory Committee's draft was referred to the Third Committee of the Assembly. The Committee made two changes to the English text. First, the translation of "*pouvoir d'indiquer*" was revised from "power to suggest" to "power to indicate."[226] Second, the English "should" was changed to "ought" to comport with "*doivent*."[227] Had the Assembly intended the Court's authority to indicate provisional measures to be merely advisory, there would have been no reason to make these changes.[228]

---

[222] *See* "Memorandum Presented by the Legal Section of the Permanent Secretariat of the League of Nations," reprinted in *Documents Presented to the Committee Relating to Existing Plans for the Establishment of a Permanent Court of International Justice* (1920).

[223] *See* Manley O. Hudson, *op. cit.*, p. 425. *See generally* Hans-Jürgen Schlochauer, "Bryan Treaties (1913/1914)," in *Encyclopedia of Public International Law*, Vol. I (1992), pp. 509-11.

[224] United Nations Committee of Jurists, *Documents of the United Nations Conference on International Organization San Francisco, Seventh Meeting, 13 Apr. 1945*, Vol. 14 (1945), p. 172. Only two changes were included in the text of Article 41. The first, following a proposal from the United States, was the addition of the word "Security" before "Council" in the second paragraph, to distinguish the organ to be notified of provisional measures from the Council of the League of Nations. Second, the word "reserve," in the second paragraph, was changed to "preserve" in accordance with the original version approved in 1920 but inadvertently altered in a typographical error.

[225] Commission IV/1, *Documents of the United Nations Conference on International Organization San Francisco, Sixth Meeting, 12 May 1945*, Vol. 13 (1945), p. 170.

---

[226] *See Procès-Verbaux of the Third Committee of First Assembly, Fifth Meeting, 29 Nov. 1920*, reprinted in *League of Nations: Permanent Court of International Justice Documents Concerning the Action Taken by the Council of the League of Nations*, Vol. 3 (1920), p. 134 (noting that "M. Huber said that the existing divergence between the two treaties must be eliminated and he insisted that the stronger term 'indiquer' should be considered authentic").

[227] *See ibid.*

[228] Some commentators have nevertheless been confused by a single exchange in the Advisory Committee, by which the Committee declined to adopt a proposal to replace "indicate" in Article 41 with "order." *See Procès-Verbaux of the Proceedings of the Committee, 28th Meeting, 20 July 1920*, reprinted in *League of Nations: Legal*, Vol. 2 (1920), p. 588. *See, e.g.*, Jerzy Sztucki, *op. cit.*, p. 24; Edward Dumbauld, *op. cit.*, p. 168 & n. 9. This exchange simply cannot carry the weight that some have asked it to bear. *First*, as a matter of law, the preparatory work cannot override the ordinary meaning of the Article in its context and in light of the statute's object and purpose. *Second*, there is no reason to believe that the drafters believed that the term "indicate" would carry any less force than "order." *See* authorities cited at note 192 *supra*. *Third*, any inference from an amendment that *was not* adopted in the Advisory Committee could not overcome the contrary inference from the revision that *was* made by the Third Committee, as the action taken by the delegates to the Assembly that actually adopted Article 41 is better evidence of the Assembly's understanding. *Finally*, the exchange, as well as a similar discussion in the Committee Report, reflects not a conviction that the measures were not binding but rather a concern that the Court would have no means to enforce them. *Procès-Verbaux of the Third Committee of First Assembly, Fifth Meeting, 29 Nov. 1920*, reprinted in *League of Nations: Permanent Court of International Justice Documents Concerning the Action Taken by the*

(continued...)

F. THE COURT MUST CONSIDER THE ORDINARY MEANING, CONTEXT, OBJECT AND PURPOSE, RELEVANT RULES, AND ADOPTION HISTORY AS THEY INFORM INTERPRETATION TODAY

5.60 In applying the available means of treaty interpretation, the Court cannot ignore the contemporary fabric of international law. The treaty at issue, the Statute of the Court, is a constitutive treaty that must speak for decades or longer. It legitimates the work of an institution that stands at the apex of the international legal order. Given that position, the Court cannot ignore the contemporary legal universe in which Article 41 operates.

5.61 This universe is far removed from that in which the predecessor to Article 41 originated. In particular, the capacity of an international tribunal to deal authoritatively with States no longer stirs the controversy or concern that it once may have.[229] If this Court is to vindicate the role of the rule of law in the quest for peace, it must assert its authority to perform effectively the task the Charter has assigned it.

---

228. (...continued)
Council of the League of Nations, Vol. 3 (1920), p. 134 (statement of Chairman Hagerup); Henri-A. Rolin, *op. cit.*, p. 285 (examining Procès-Verbaux, Commissions, I, p. 368, and concluding that binding nature of provisional measures was not at issue). *See also* Advisory Committee of Jurists, *Report on the Draft Scheme for the Establishment of the Permanent Court of International Justice* (1920), p. 45.

[229] *See, e.g., Texas Overseas Petroleum Co./California Asiatic Oil Co. and Libyan Arab Republic* (Dupuy, arb., 19 Jan. 1977) (Merits), reprinted in 17 I.L.M. 3 (1977) and 53 I.L.R. 389 (1979).

CHAPTER 6

PARAGUAY IS ENTITLED TO APPROPRIATE AND MEANINGFUL REMEDIES

6.1 Paraguay is entitled to adequate reparation for the United States' violations of its international legal obligations, and it need not ground its request for relief in any express authorization of a particular remedy in the text of the Vienna Convention.

> It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation, therefore, is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the Convention itself.[230]

To the contrary, "[p]rinciples of international law concerning remedies are not rigid or formalistic and give an international tribunal wide latitude to develop and shape remedies."[231]

6.2 There are four remedies to which Paraguay is entitled as a result of the United States' several violations of the Vienna Convention and customary law, including its violation of this Court's Provisional Measures Order: (i) a declaration that the United States violated the Vienna Convention in the manner set forth in this Memorial; (ii) an order of non-repetition; (iii) *restitutio in integrum*, that is, a restoration of the status quo — now an impossibility given the execution of Mr. Breard; and (iv) compensation and satisfaction in lieu of *restitutio*.

---

[230] *Memorial of the United States, United States Diplomatic and Consular Staff in Tehran, I.C.J. Pleadings 1980*, p. 188, quoting *Factory at Chorzów, Jurisdiction, Judgment No. 8, 1927, P.C.I.J. Series A, No. 9*; *see also Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J. Series A, No. 17*, p. 29; *Affaires des biens britanniques au Maroc espagnol (Sp. - Gr. Brit.), 1 May 1925*, 2 R.I.A.A. 615, 641.

[231] *Restatement (Third) of the Foreign Relations Law of the United States* § 901, cmt. d (1987).

I.

Paraguay Is Entitled to a Declaration that the United States Violated Paraguay's Rights Under the Vienna Convention

6.3 This Court has jurisdiction to render declaratory judgments in contentious cases. The purpose of such declaratory relief is to "ensure recognition of a situation at law, once and for all and with binding force as between the Parties, so that the legal position thus established cannot again be called in question in so far as the legal effects ensuing therefrom are concerned."[232]

6.4 It is with a view to just such a final interpretation of the Vienna Convention that Paraguay requests a declaratory judgment from the Court. The parties' dispute in this case concerns the application of the Vienna Convention, an important treaty that remains in force between the parties. Definitive interpretations by this Court on the requirements of Article 36 of the Convention and the consequences of violating its provisions will ensure that the parties apply the Convention properly in the future and should obviate the need for the parties to return to this Court with a similar dispute.

6.5 Related concerns support a declaratory judgment with respect to the United States' violation of the Provisional Measures Order entered by the Court in this case. The United States' breach of the Order also raises hotly disputed legal and factual issues with continuing ramifications that this Court should definitively resolve.

II.

Paraguay Is Entitled to an Order of Non-Repetition

6.6 Paraguay is entitled to an order that the United States not repeat its violations of international law. As stated in the

---

[232] *Factory at Chorzów, Interpretation of Judgments Nos. 7 and 8, Judgment No. 11, 1927, P.C.I.J., Series A, No. 13*, p. 20.

International Law Commission's Draft Articles on State Responsibility, an "injured state is entitled, where appropriate, to obtain from the State which has committed an internationally wrongful act assurances or guarantees of non-repetition of the wrongful act."[233]

6.7 There is particular need for an order of non-repetition in this case, because the United States has already evinced a pattern of violating the Vienna Convention,[234] and Paraguay is entitled to assurances that its rights will not be similarly violated in the future should a Paraguayan national be arrested in the United States.

---

[233] *Draft Articles on State Responsibility, op. cit.*, art. 46.

[234] *See, e.g., Republic of Paraguay v. Allen*, 134 F.3d 622, 629 & n.7 (4th Cir. 1998) (expressing the court's "disenchantment" with Virginia's repeated violations of the Vienna Convention); *United Mexican States v. Woods*, 126 F.3d 1220, 1222-1223 (9th Cir. 1997); *Murphy v. Netherland*, 116 F.3d 97, 100 (4th Cir. 1997); *Faulder v. Johnson*, 81 F.3d 515, 550 (5th Cir. 1996). On 22 April 1998, one week after the execution of Mr. Breard, the State of Arizona executed José Roberto Villafuerte, despite pleas from President Carlos Flores Facusse of Honduras and an acknowledgment by the United States Department of State that Article 36 was violated. *See* "US executes Honduran national by lethal injection," *Agence France Presse*, 22 Apr. 1998, available in LEXIS, News library, Curnws file; Philippe Sands, "Execution of Paraguayan a Serious Error," *Newsday*, 23 Apr. 1998, p. A49. According to Amnesty International, there are more than 60 foreign nationals on death row in the United States who were denied their consular notification rights under the Vienna Convention. Amnesty International, *The Execution of Angel Breard: Apologies Are Not Enough*, May 1998, pp. 1-2; *see also Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Execution, Mr. Bacre Waly Ndiaye, Submitted Pursuant to Commission Resolution 1997/61, Official Records of the Economic and Social Council, Commission on Human Rights, 54th Session*, provisional agenda item 10, para. 118, document E/CN.4/1998/68/Add.3; Marcia Coyle, "Are 65 Illegally on Death Row in U.S.?", *National Law Journal*, 27 Apr. 1998, p. A16.

III.

Paraguay Was Entitled to *Restitutio in Integrum*

6.8 In the classic formulation from the *Chorzów Factory Case*: "The essential principle of international law is 'that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.'"[235] Thus, "*restitutio in integrum* is the natural redress of any violation of" international treaty obligations.[236]

6.9 Restitution is the sole remedy that could have provided meaningful relief to Paraguay and its national — undoing the effects of the United States' illegal acts (Mr. Breard's conviction and/or death sentence) and permitting the exercise by Paraguay of its rights under the Vienna Convention.[237]

---

[235] *Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17*, p. 47. *See also Draft Articles on State Responsibility, op. cit.*; *Restatement (Third) of Foreign Relations Law of the United States* § 901, cmt. d (1987) ("Ordinarily, emphasis is on the forms of redress that will undo the effect of the violation, such as restoration of the *status quo ante*, restitution, or specific performance of an undertaking . . . ."); Jiménez de Aréchaga, *op. cit.*, pp. 565-67.

[236] *Factory at Chorzów, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9*, p. 28. *See also* Oscar Schachter, *International Law in Theory and Practice: General Course in Public International Law* (1985), p. 190 ("When a state is internationally responsible for a wrongful act . . . [it is] normally under a duty to restore the situation as it existed before the breach."); *Texas Overseas Petroleum Co./California Asiatic Oil Co. and Government of the Libyan Arab Republic*, (Dupuy, arb., 19 Jan. 1977) (Merits), reprinted in 17 I.L.M. 3 (1977) and 53 I.L.R. 389 (1979) (citing Lauterpacht, Reitzer, Schwarzenberger, Jiménez de Aréchaga, de Visscher, Tenékidès and Guggenheim in support of *restitutio in integrum* as the basis of reparation).

[237] Schachter, *op. cit.*, p. 190 ("When a State is internationally responsible for a wrongful act, it is under an obligation to discontinue the act and to prevent the continuing of the effects of this act."); *Restatement*

(continued...)

6.10 In this case, as adequate reparation for its illegal acts, the United States would have had to void Mr. Breard's conviction and sentence, permit Paraguay fully to exercise its right of consular assistance at any new trial, and reconvey the plea offer that Mr. Breard rejected as a result of his lack of consular protection; a judgment requiring such relief would have restored the *status quo ante*. Absent such an order, Paraguay and its national would continue to suffer the consequences of the breach — as they did here.

6.11 It is of no consequence that restitution would have required the United States to reverse the judgment of a domestic criminal proceeding. "The obligation of a state to terminate a violation of international law may include discontinuance, revocation, or cancellation of the act (whether legislative, administrative or judicial) that caused the violation."[238]

6.12 While it falls to the Court to determine the parties' international legal obligations, it falls to the parties to comply with those legal obligations. The Court will not give practical advice to

---

237. (...continued)
(Third) of Foreign Relations Law of the United States § 901, cmt. d (1987) ("Ordinarily, emphasis is on the forms of redress that will undo the effect of the violation . . ."). *Cf. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 54; *Haya de la Torre, Judgment, I.C.J. Reports 1951*, p. 82 ("[t]his decision entails a legal consequence, namely that of putting an end to an illegal situation: the Government of Colombia which had granted the asylum irregularly is bound to terminate it. As the asylum is still being maintained, the Government of Peru is legally entitled to claim that it should cease."); *Restatement (Third) of Foreign Relations Law of the United States* § 901 (1987) ("Under international law, a state that has violated a legal obligation to another state is required to terminate the violation . . .").

[238] *Restatement (Third) of the Foreign Relations Law of the United States* § 901, cmt. c (1987). *See United States v. Rangel-Gonzales*, 617 F.2d 529 (9th Cir. 1980) (overturning conviction for illegal entry after deportation because defendant prejudiced by immigration officials' failure in deportation proceedings to inform of right to contact consulate).

the parties as to how to implement their obligations. Instead, the Court "assume[s] that the Parties, [once] their mutual legal relations have been made clear, will be able to find a practical and satisfactory solution."[239]

6.13 Finally, the Vienna Convention specifically contemplates the possibility that compliance with its obligations might require changes to domestic law. As discussed above, Article 36(2) requires that municipal "laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this article are intended."

6.14 The *travaux préparatoires* to the Vienna Convention demonstrate that the States Parties anticipated the potential conflict between Article 36's obligations and domestic criminal law, and that they understood that the international obligation undertaken must take priority over countervailing rules of municipal law.[240] At the Vienna Conference on Consular Relations in 1963, the Soviet delegate proposed restoring the International Law Commission draft of Article 36(2), which only required that municipal laws not "nullify" the rights under Article 36. The Soviet delegate objected to the positive formulation of Article 36(2) requiring states' municipal laws to give "full effect to the purposes" for those rights, because "it might force states to alter their criminal laws and regulations and allow consuls to interfere with normal legal procedure in order to protect alien offenders."[241] The Romanian delegate supported the Soviet amendment, stating that "[t]he provisions of the article could not possibly attempt to modify the criminal laws or regulations or the criminal procedure of the receiving State."[242] Further, the Romanian delegate opposed the idea that international law was superior to domestic law. Thus, the delegates debated these issues, and rejected the position that Article 36 should not be permitted to require a State to revise or alter its criminal procedures or laws. The Conference, instead, passed the current language, "which conformed to the principle that international law prevailed over municipal law."[243]

---

[239] *Haya de la Torre, Judgment, I.C.J. Reports 1951*, p. 82. Significantly, the Court's judgment in the *Haya de la Torre* case ordered the termination of what it had determined to be an illegal grant of asylum. States typically view their powers over immigration as fundamental to sovereignty, perhaps more so than even the criminal law. Nonetheless, this Court determined this sovereign act to have been illegal and ordered that it be reversed.

[240] Lee Aff., paras 4-8.

[241] United Nations, *Official Records of the Conference on Consular Relations, Vol. I, Twelfth Plenary Meeting*, para. 4, document A/CONF.25/6.

IV.

Given the United States' Violation of the Order, Making *Restitutio in Integrum* Impossible, Paraguay Is Entitled to Alternative Reparation

6.15 The United States' action in executing Mr. Breard had the effect, and was designed for the very purpose,[244] of preventing the possibility of *restitutio in integrum*.

6.16 This Court must not permit the United States to limit its international responsibility to Paraguay through deliberate disregard of the rule of law. As the United States has previously argued, "[t]his Court can best uphold the rule of law in the international community by emphasizing that serious breaches of international law are not without consequence."[245]

6.17 Under international law, Paraguay was entitled to restitution of the *status quo ante* as the best and only adequate remedy for the United States' violations of the Vienna Convention.

---

[242] *Ibid., Eleventh Plenary Meeting*, para. 26.

[243] *Ibid., Nineteenth Meeting of the First Committee*, para. 5 (statement of the Spanish delegate).

[244] Statement of Governor Jim Gilmore (14 Apr. 1998), Annex 24.

[245] *Memorial of the United States, United States Diplomatic and Consular Staff in Tehran, I.C.J. Pleadings 1980*, p. 189.

The actions of the United States that now prevent the Court from providing this remedy do not affect Paraguay's original entitlement to *restitutio* or the United States' responsibility now to make alternative reparation that approximates as closely as possible restoration of the *status quo ante*. As stated by the Court in *Factory at Chorzów*, adequate reparation requires "[r]estitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear . . . ."[246]

6.18 Similarly, by the very nature of the United States' violation of this Court's Order of Provisional Measures, *restitutio in integrum* is not available as a remedy for that breach. Therefore, alternative reparation must also be available for this breach of international law.

6.19 Reparation in any form must, as far as possible, "wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability have existed if that act had not been committed."[247] Needless to say, where, as here, the illegal act resulted in the death of a human being, no form of reparation can wipe out the consequences of that act. Inadequate though it may be, however, Paraguay is entitled now to seek an alternative to the form of relief originally sought. Thus, Paraguay should receive (1) compensation for the taking of Mr. Breard's life in violation of both the Vienna Convention and this Court's Order of Provisional Measures; and (2) satisfaction, in the form of moral damages, for the moral injury it suffered as a result of these violations.

6.20 Paraguay respectfully requests that the Court "receive evidence and . . . determine, in a subsequent phase of [these] proceedings, the amount of damage to be assessed" in lieu of *restitutio in integrum*.[248]

---

[246] *Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17*, p. 47.

[247] *Ibid.*

[248] *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland),* (continued...)

SUBMISSIONS

6.21 FOR THESE REASONS, the submissions of the Government of the Republic of Paraguay are as follows:

MAY IT PLEASE THE COURT

(a) to adjudge and declare that the United States violated its international legal obligations to Paraguay, in its own right and in the exercise of its right of diplomatic protection of its national, under articles 5 and 36 of the Vienna Convention, by arresting, detaining, trying, convicting, sentencing, and executing Angel Francisco Breard without providing Paraguayan consular officials the opportunity to provide effective assistance;

(b) to adjudge and declare that the United States violated its international legal obligation under Article 36(2) of the Vienna Convention by applying the municipal-law doctrine of procedural default to bar Angel Francisco Breard from raising his claim under the Vienna Convention and thereby failing to give full effect in United States municipal law to the provisions of Article 36;

(c) to adjudge and declare that the United States violated its international legal obligation to comply with the Provisional Measures Order issued by this Court on 9 April 1998 by failing to take all measures at its disposal to ensure that Angel Francisco Breard was not executed; and

(d) to adjudge and declare that the United States violated its international legal obligation not to undertake any action that might prejudice any eventual decision in the case or aggravate the dispute by failing to halt the execution of Angel Francisco Breard;

and, in light of the foregoing violations.

---

248. (...continued)
Merits, Judgment, I.C.J. Reports 1974, p. 205.

(e) to adjudge and declare that the United States is under an international legal obligation to provide Paraguay a guarantee that the United States will not repeat its illegal acts, but will carry out in conformity with the foregoing international legal obligations, any future detention of or criminal proceedings against any Paraguayan national in its territory, whether by a constituent, legislative, executive, judicial, or other power, whether that power holds a superior or a subordinate position in the organization of the United States, and whether that power's functions are of an international or internal character;

(f) to adjudge and declare that Paraguay was entitled to *restitutio in integrum* and would have been entitled to the restoration of the *status quo ante* had the United States not executed Mr. Breard;

(g) to adjudge and declare that in light of the United States' actions rendering it impossible for the Court to provide the remedy of *restitutio in integrum*, Paraguay, in its own right and in the exercise of diplomatic protection of its national, is entitled to payment by the United States, in an amount to be determined by the Court in a subsequent proceeding, of (1) compensation and (2) moral damages as satisfaction;

(h) to adjudge and declare that, as a remedy for the United States' breach of the Provisional Measures Order and of its international legal obligation not to undertake any action that might prejudice any eventual decision in the case or aggravate the dispute, the Republic of Paraguay is entitled to payment by the United States, in an amount to be determined by the

Court in a subsequent proceeding, of (1) compensation and (2) moral damages as satisfaction.

The Hague, 9 October 1998

(Signed) Manuel María CÁCERES
Agent of the Republic of Paraguay

Dr. José Emilio Gorostiaga
Asunción, Paraguay
Advocate-Counselor

Donald Francis Donovan
Barton Legum
Michael M. Ostrove
Alexander A. Yanos
Katherine Birmingham Wilmore
John M. Driscoll
Haider Ala Hamoudi
Daniel C. Malone
Debevoise & Plimpton
New York, New York, USA
Advocates-Counselors and Counselors

Text reflects corrections submitted
to the Court on 9 November
and 23 December 1998

LIST OF ANNEXES[1] TO THE MEMORIAL OF PARAGUAY

Annex 1. Affidavit of Sra. Armenia Guibi Vda. de Breard, Mother of Angel Francisco Breard (Translation)

Annex 2. Stipulation regarding Failure of Virginia Officials to Notify Mr. Breard of His Vienna Convention Rights

Annex 3. United States Department of State, *Consular Notification and Access*, pp. 1 and 4

Annex 4. Portions of the United States *Foreign Affairs Manual* Dealing with Consular Notification and Access

Annex 5. Portions of *ICJ Pleadings, Vienna Convention on Consular Relations (Paraguay* v. *United States of America), Verbatim Record* (Uncorrected), CR 98/7

Annex 6. Affidavit of Sr. Jorge G. Prieto, Former Paraguayan Ambassador to the United States

Annex 7. Statement of His Excellency Ceferino Adrian Valdez Peralta, Paraguayan Ambassador to Taiwan

Annex 8. Portions of Mr. Breard's Petition for a Writ of Habeas Corpus in Federal Court

Annex 9. Portions of Affidavit of Mr. Breard's Trial Counsel, Messrs. Richard J. McCue and Robert L. Tomlinson, II

Annex 10. Portions of the Virginia Statutes governing Capital Cases

Annex 11. Memorandum from Mr. Breard's Trial Counsel, Messrs. Richard J. McCue and Robert Lee Tomlinson, II, to Mr. Breard

Annex 12. Affidavit of Professor William S. Geimer, Director of the Virginia Capital Case Clearinghouse

Annex 13. Affidavit of Dr. José Ignacio Gonzalez Macchi, Paraguayan Criminal Court Judge (Translation)

Annex 14. Portions of Mr. Breard's Petition for a Writ of Habeas Corpus in Virginia State Court

Annex 15. Affidavit of Mr. Alexander S. Slaughter, Federal Habeas Counsel to Mr. Breard

Annex 16. Statement of Sr. Ricardo Caballero Aquino, Counselor in the Paraguayan Embassy to the United States

Annex 17. Portions of Virginia's Motion to Dismiss Mr. Breard's State Habeas Petition

Annex 18. Portions of *Breard* v. *Netherland*, 949 F. Supp. 1255 (E.D. Va. 1996)

Annex 19. Portions of *Breard* v. *Pruett*, 134 F. 3d 615 (4th Cir. 1998)

Annex 20. Letter Dated 13 April 1988 from Donald Francis Donovan, Counsel to the Republic of Paraguay, to Seth P. Waxman, Solicitor General, and David R. Andrews, Legal Advisor, United States Department of State

Annex 21. Portions of the Brief for the United States as Amicus Curiae on Petition for a Writ of *Certiorari*

---

[1] Not reproduced.

Annex 22. LETTER DATED 13 APRIL 1998 FROM HER EXCELLENCY MADELINE K. ALBRIGHT, SECRETARY OF STATE OF THE UNITED STATES, TO THE HONORABLE JAMES S. GILMORE, III, GOVERNOR OF THE COMMONWEALTH OF VIRGINIA

Annex 23. OPINION OF THE SUPREME COURT DENYING *CERTIORARI* IN *BREARD* V. *GREENE*, 118 S. CT. 1352 (1998)

Annex 24. STATEMENT OF 14 APRIL 1998 BY THE HONORABLE JAMES S. GILMORE, III, GOVERNOR OF THE STATE OF VIRGINIA

Annex 25. AFFIDAVIT OF MS NANCY HUERTA, FEDERAL HABEAS COUNSEL TO MR. BREARD AND WITNESS TO THE EXECUTION

Annex 26. LETTER DATED 15 APRIL 1998 FROM MR. DAVID R. ANDREWS, AGENT OF THE UNITED STATES TO MR. EDUARDO VALENCIA-OSPINA, REGISTRAR OF THE INTERNATIONAL COURT OF JUSTICE

Annex 27. LETTER DATED 28 APRIL 1998 FROM HIS EXCELLENCY MANUEL MARÍA CÁCERES, AGENT OF THE REPUBLIC OF PARAGUAY, TO MR. EDUARDO VALENCIA-OSPINA, REGISTRAR OF THE INTERNATIONAL COURT OF JUSTICE

Annex 28. PORTIONS OF BRIEF OF BRAZIL, ARGENTINA, ECUADOR, AND MEXICO AS AMICI CURIAE IN SUPPORT OF PARAGUAY'S PETITION FOR A WRIT OF *CERTIORARI* FROM THE UNITED STATES SUPREME COURT

Annex 29. AFFIDAVIT OF PROFESSOR LUKE T. LEE

CORRESPONDENCE

CORRESPONDANCE

1. THE AGENT OF PARAGUAY TO THE REGISTRAR OF THE INTERNATIONAL COURT OF JUSTICE

7 April 1998.

In its oral submissions this morning, the United States stated that there was no support in the domestic caselaw of the United States for the proposition that a failure to accord the consular notification rights protected by the Vienna Convention might affect the validity of a criminal conviction.

In rebuttal, Paraguay referred to *United States* v. *Rangel-Gonzalez*, a decision of the United States Court of Appeals for the Ninth Circuit, and to an earlier case from the same court on which *Rangel-Gonzalez* built. See *United States* v. *Rangel-Gonzalez*, 617 F. 2d 529 (9th Cir. 1980); *United States* v. *Calderon-Medina*, 591 F. 2d 529 (9th Cir. 1979). We have provided copies of these decisions to the Court.

At the conclusion of Paraguay's rebuttal, the Court asked whether the defendants in those cases had been retried. Paraguay partially responded and stated that it would complete its response later today. Paraguay herewith attaches that further response.

(Signed) Manuel Maria CÁCERES.

Response of Paraguay to Question Posed at Conclusion of Paraguay's Rebuttal Submission

In *United States* v. *Calderon-Medina*, 591 F. 2d 529 (9th Cir. 1979), which involved two consolidated cases, a federal trial court had dismissed indictments for illegal re-entry following deportation. Such re-entry is a federal crime pursuant to 8 USC § 1326. The courts had dismissed the indictments on the ground that in the underlying deportations, immigration officials had not complied with a federal regulation that (1) provided that "[e]very detained alien shall be notified that he may communicate with the consular or diplomatic officers of the country of his nationality", and (2) was intended to "ensure compliance" in immigration proceedings with the United States' obligations under the Vienna Convention (591 F. 2d at 530 (quoting 8 CFR § 242.2 *(e)* (1978)); *ibid.*, at 530, n. 6). The Court of Appeals held that a deportation could be denied effect as a predicate for the crime of illegal entry following deportation "only if the violation prejudiced interests of the alien which were protected by the regulation" (*ibid.*, at 531). Applying that standard, the Court held that the consular notification regulation protected interests of the aliens, but remanded for a determination of prejudice.

There is no published subsequent decision in the case of Mr. Calderon-Medina. In *United States* v. *Rangel-Gonzalez*, 617 F. 2d 529 (9th Cir. 1980), the companion case returned to the Court of Appeals after defendant had been convicted of the offence charged, illegal re-entry after deportation. The Court first held that the trial court had clearly erred by finding that the failure to notify the Mexican consul had not affected the outcome of the deportation proceeding. It then reversed the conviction, holding that "the indictment should have been dismissed" (617 F. 2d at 529).

In the posture of *Rangel-Gonzalez*, unlike here, the consular notification violation in the underlying deportation proceedings would have tainted any subsequent indictment for illegal re-entry after deportation in the same manner as it tainted the original indictment. Accordingly, Paraguay presumes that there were no further proceedings on those charges. There is, in any event, no subsequent published decision in *Rangel-Gonzalez*, so Paraguay also cannot determine whether the United States initiated new deportation proceedings, which would be the proceedings analogous to the state trial in this case.

2. THE AGENT OF THE UNITED STATES OF AMERICA TO THE REGISTRAR

9 April 1998.

I have the honor to refer to the Court's Order today in relation to Paraguay's request for an indication of provisional measures in the case concerning the *Vienna Convention on Consular Relations (Paraguay* v. *United States of America)*.

In its Order, the Court indicated that the United States should "inform the Court of all the measures which it has taken in implementation" of the Order. Accordingly, I wish to inform you of several recent actions related in that Order.

1. On April 2, the day before this case was filed, I communicated to the Counsel of the Governor of Virginia, on behalf of the Secretary of State of the United States, a request that the Commonwealth of Virginia stay the execution of Angel Breard. After consultation with the Governor, Counsel for the Governor replied that Virginia was not at that time prepared to grant our request in light of the pendency of the case before the US Supreme Court.
2. I have today transmitted to the Governor of Virginia a copy of the Court's Order and requested that he give consideration to it.
3. I have asked the Solicitor General of the United States (the Justice Department official who represents the United States before the US Supreme Court) to ensure that a copy of the Court's Order is promptly transmitted to the Supreme Court, and this is being done. We are also discussing the Court's Order with officials of the Department of Justice as a matter of urgency.

(Signed) David R. ANDREWS.

3. THE AGENT OF THE UNITED STATES OF AMERICA TO THE REGISTRAR

(by telefax)

15 April 1998.

I have the honor to refer further to the Court's Order of April 9 in the case concerning the *Vienna Convention on Consular Relations (Paraguay* v. *United States of America)*. In that Order, the Court indicated that the United States should "inform the Court of all the measures which it has taken in implementation" of the Order. I have previously written to you concerning the measures taken on April 9. This letter describes subsequent events.

1. On Monday, April 13, the Secretary of State of the United States wrote to Governor Gilmore of the Commonwealth of Virginia, formally requesting that he exercise his powers as Governor to stay the execution of Mr. Angel Breard in light of the Court's indication of provisional measures. A copy of Secretary Albright's letter to Governor Gilmore is attached [1].

2. Also on April 13, the Solicitor General filed a brief in the US Supreme Court on behalf of the United States responding to an April 9 order from the Supreme Court. This brief was prepared with close consultation between the US Departments of State and of Justice. It stated that:

> "[t]he Executive Branch, on behalf of the United States, takes the order recently entered by the ICJ very seriously, even though the United States argued against that court's jurisdiction and against the indication of provisional measures. Accordingly, in response to the ICJ's order, the Secretary of State is today requesting that the Governor of Virginia stay Breard's execution".

At the same time, the US brief concluded that it would be inconsistent with the governing rules of US domestic law for the Supreme Court to order a stay of Mr. Breard's execution by the Commonwealth of Virginia, for many of the reasons indicated by the US Supreme Court in its April 14 opinion *(infra)*. Several other briefs were filed in the Supreme Court on April 13 and 14, including a further brief by Paraguay filed on April 14.

3. During the evening of April 11, the Supreme Court of the United States issued a *per curiam* opinion denying the various motions and petitions before it relating to Mr. Breard's case. A copy is attached [2].

4. Following the Supreme Court's action, later in the evening of April 14, the Governor of Virginia decided not to stay the execution, and Mr. Breard was executed.

This Court's April 9 Order indicated that the United States "should take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in these proceedings". The United States has taken "the Court's indications seriously into account", case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment of 27 June 1986*, para. 289. Through its actions, culminating in the Secretary of State's April 13 request to the Governor of Virginia to stay Mr. Breard's execution on account of this Court's indication of provisional measures, the United States took all measures lawfully at its disposal to do what the Court requested.

4. THE AGENT OF PARAGUAY TO THE REGISTRAR

28 April 1998.

I have the honour to respond to the letter of David R. Andrews, Agent of the United States to this Court, dated 15 April 1998, reporting on the actions of the United States pursuant to the Court's Order of 9 April 1998 indicating provisional measures in the case concerning the *Vienna Convention on Consular Relations (Paraguay* v. *United States of America).*

---

[1] Not reproduced.

[2] Not reproduced.

As the United States advises, officials of the Commonwealth of Virginia executed Angel Francisco Breard as scheduled on Tuesday, 14 April 1998. The Governor of the Commonwealth of Virginia took no steps to halt the execution, and no federal authority took any action to compel Virginia officials not to go forward. In these circumstances, Paraguay regretfully takes issue with the United States' assertion that it complied with its obligation to "take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in these proceedings".

At the time this Court issued its 9 April Order, Paraguay had pending before the United States Supreme Court a petition for a writ of *certiorari* and accompanying application for a stay of or injunction against the execution. On Friday, 10 April, Paraguay submitted a supplemental application for a stay or injunction, citing the Order as a separate and independent ground on which to grant the application. Also on Friday, 10 April, Mr. Breard, who already has pending a petition for a writ of *certiorari*, filed an original petition for a writ of *habeas corpus* in the Supreme Court on the basis of the Order indicating provisional measures. On Monday, 13 April, also invoking the Supreme Court's original jurisdiction, Paraguay filed a motion for leave to file an original complaint that, like the supplemental application for a stay or injunction, requested relief from the execution on the basis of this Court's Order.

Also on Monday, 13 April, Paraguay's counsel wrote to Mr. Waxman, Solicitor General of the United States, and Mr. Andrews, Legal Adviser to the Department of State and Agent to this Court in this proceeding, to call upon the United States to fulfil its obligations pursuant to the 9 April Order. Paraguay requested that the United States (i) support Paraguay's applications to the United States Supreme Court for a stay of Mr. Breard's execution pending a final decision by this Court on the merits of Paraguay's suit; (ii) file an action in the United States' own name in the United States District Court requiring Virginia officials to comply with the 9 April Order; (iii) support Mr. Breard's applications for relief from the impending execution; and (iv) take any other steps that might be necessary to ensure compliance with the 9 April Order by Virginia officials and, hence, the United States. That letter, a copy of which is attached, confirmed discussions between counsel to Paraguay, on the one hand, and Mr. Andrews, Mr. Waxman, and their deputies, on the other, during the period immediately following issuance of the Order.

The United States did not take any of the steps identified in the 13 April letter. Instead, on 9 April, the United States submitted a copy of the Order to the United States Supreme Court, and on 13 April, the Secretary of State wrote a letter to the Governor of the Commonwealth of Virginia requesting that he grant a reprieve of Mr. Breard's execution, a request the Governor declined to honour. At the same time, in a brief filed 13 April 1998 and signed by the Solicitor General and Mr. Andrews, in his capacity as Legal Adviser of the State Department, the United States argued to the Supreme Court that (i) the Order indicating provisional measures was "precatory rather than mandatory"; (ii) the Secretary's letter represented the only "measure[] at [the United States'] disposal under [the United States] Constitution" to ensure compliance with the 9 April Order; and (iii) the Supreme Court should not grant either Paraguay's or Mr. Breard's requests for a stay of the execution.

Early on 14 April, Paraguay submitted a reply to the brief of the United States to the Supreme Court, again urging that court to give effect to this Court's Order.

At approximately 8.30 p.m. on 14 April, the United States Supreme Court issued a decision denying (i) Paraguay's petition for a writ of *certiorari* and motion for leave to file an original complaint; (ii) Mr. Breard's petitions for a writ of *certiorari* and for an original writ of *habeas corpus*; and (iii) the corresponding requests for provisional relief halting the execution. *Breard* v. *Greene*, 66 USLW 3684 (US Apr. 14, 1998) (Nos. 97-8214, 97-1390, 97-8660, and 125 Orig.). The decision barely acknowledged this Court's Order and did not expressly consider its effect.

Immediately upon learning of the Supreme Court's decision, Paraguay filed a new complaint in the United States District Court for the Eastern District of Virginia requesting that court to give effect to the Order indicating provisional measures by ordering Virginia officials not to carry out the execution. When that court denied emergency relief, Paraguay took an immediate appeal to the United States Court of Appeals for the Fourth Circuit, which also denied relief. Around the same time, the Governor announced that he would not accede to the Secretary's request to halt the execution. Shortly thereafter, at approximately 10.30 p.m., Virignia officials executed Mr. Breard.

Paraguay respectfully submits that the filing of this Court's Order with the Supreme Court and the issuance of the Secretary's letter to the Governor did not amount to "all measures at [the] disposal" of the United States to ensure that Mr. Breard's execution be stayed.

First, the Governor of Virginia, an official of the United States as a matter of international law, has plenary power to grant reprieves of capital sentences. See *Va. Stat. Ann.*, § 53.1-229 ("[T]he power to commute capital punishment and to grant pardons or reprieves is vested in the Governor"); see also *ibid.*, § 53.1-232 (D) ("Should the condemned prisoner be granted a reprieve by the Governor . . . the Director [of Corrections] shall yield obedience to [such reprieve]"). At the end of the term of reprieve by the Governor, an execution may proceed without resentencing. See *ibid.*, § 53.1-232 (C). The Governor, however, failed to grant Mr. Breard a reprieve.

Second, the breadth of federal authority in the area of international relations belies the United States' suggestion that federal executive authorities were constitutionally incapable of enforcing compliance by state officials with federal law in the form of the United States' international obligations. See *Sanitary District* v. *United States*, 266 US 405, 425-426 (1925) (United States has standing to bring suit against State of Illinois to "carry out treaty obligations to a foreign power"); *United States* v. *Arlington County*, 669 F. 2d 925 (4th Cir.), *cert. denied*, 459 US 801 (1982) (suit by United States to enforce bilateral international agreement and enjoin municipality from taxing property owned by foreign government); *United States* v. *City of Glen Cove*, 322 F. Supp. 149 (EDNY), *aff'd on opinion below*, 450 F. 2d 884 (2d Cir. 1971) (suit by United States to enforce bilateral consular convention and enjoin municipality from assessing taxes on property owned by foreign government); see also *Dames & Moore* v. *Regan*, 453 US 654 (1981) (affording Executive Branch great latitude in effecting resolution of international dispute); *Asakura* v. *Seattle*, 265 US 332 (1924) (enjoining enforcement of municipal ordinance that violated treaty). Indeed, in his brief to the Supreme Court, the United States Solicitor General expressly recognized that the federal executive has the authority to bring a judicial action to enforce compliance with international obligations by constituent entities of the United States. Brief of the United States as Amicus Curiae (13 April 1998) at 15, n. 3 (citing *United States* v. *Arlington County* to establish "the ability of the United States to sue in order to enforce compliance with the Vienna Convention").

Third, the judiciary engages the United States' international responsibility as fully as does the executive. Ian Brownlie, *State Responsibility*, Part 1, 144 (1983) ("The judiciary and the courts are organs of the state and they generate responsibility in the same way as other categories of officials"); *Report of the Int'l Law Comm'n*, UN, *GAOR*, 51st Sess., Supp. No. 10, Art. 6, at 126, UN doc. A/51/10 (1996) (draft articles on State Responsibility) ("draft articles"). The United States Supreme Court has the authority to enforce compliance by state officials with federal law, of which international law forms a part, and which prevails over inconsistent state law. US Const., Art. VI, cl. 2; *Cooper* v. *Aaron*, 358 US 1, 18-19 (1958); see also *Missouri* v. *Jenkins*, 495 US 33, 57 (1990) (federal court may order municipality to levy taxes to comply with desegregation order, even when levy would contravene state law); *French* v. *Hay*, 89 US (22 Wall.) 250 (1874) (federal court may enjoin enforcement of state judgment entered in violation of federal law); cf. *Va. Stat. Ann.* § 53.1-232 (D) (Virginia Director of Corrections must respect a stay of execution issued by any court of competent jurisdiction). The Supreme Court, the final arbiter of federal law, *Marbury* v. *Madison*, 1 Cranch 137 (1803), clearly had the authority to stop the execution by means of a stay or injunction, but did not.

Finally, the United States' failure to comply with this Court's Order would not be excused even if, as a matter of United States law, the measures identified above were not available to the state executive, the federal executive, and the federal judiciary, respectively. There can be no dispute that the execution was within the control of competent authorities of the United States. Given that control over the occurrence or non-occurrence of the disputed event, there can also be no dispute over the United States' responsibility. "It is a generally accepted principle of international law that a federal state is responsible for the conduct of its political sub-divisions and cannot evade that responsibility by alleging that its constitutional powers of control over them are insufficient for it to enforce compliance with international obligations." (Jiménez de Aréchaga, "International Responsibility", in *Manual of Public International Law*, 531, 557 (Max Sørensen, ed., 1968).) This principle reflects an even more fundamental dictate — that a State may not rely on municipal law impediments to excuse a failure to comply with an international obligation. See Vienna Convention on Law of Treaties, Art. 27; see also draft articles, Arts. 5-8, 10, at 126-128.

In sum, Paraguay submits that the United States failed to "take all measures at its disposal to ensure that Angel Francisco Breard . . . not [be] executed pending the final decision in these proceedings".

[Annex to letter not reproduced.]

5. THE AGENT OF PARAGUAY TO THE REGISTRAR

2 November 1998.

I have the honour to refer to the case concerning the application of the *Vienna Convention on Consular Relations (Paraguay* v. *United States of America)*.

In accordance with Article 89 of the Rules of Court, the Government of Paraguay hereby informs the Court that it wishes to discontinue the proceedings, with prejudice. Paraguay accordingly requests that the case be removed from the List.

6. THE AGENT OF THE UNITED STATES OF AMERICA TO THE REGISTRAR

3 November 1998.

I have the honor to refer to your letter of November 2, 1998, whereby you have conveyed to my Government a letter of the same date from the Government of Paraguay regarding the case concerning the application of the *Vienna Convention on Consular Relations (Paraguay* v. *United States of America)*.

In its November 2 letter, the Government of Paraguay has informed the Court that, in accordance with Article 89 of the Rules of Court, the Government of Paraguay wishes to discontinue the proceedings with prejudice and has requested that the case be removed from the List.

Please be advised that the Government of the United States concurs in discontinuance of the proceedings with prejudice and in the Government of Paraguay's request.

The publications of the **INTERNATIONAL COURT OF JUSTICE** may be ordered from any bookseller. For information regarding the sale of the Court's publications please write to the following :

United Nations, Sales and Marketing Section, Room DC2-853, New York, NY 10017, United States of America. Tel. (+ 1-212) 963 83 02. Fax (+ 1-212) 963 34 89. E-mail : publications@un.org

or :

Organisation des Nations Unies, Section de vente et commercialisation, Bureau C-115, Palais des Nations, 1211 Geneva 10, Switzerland. Tel. (+ 4122) 917 26 14. Fax (+ 4122) 917 00 27. E-mail : unpubli@unog.ch

All enquiries other than with regard to purchase of publications should be addressed to the *Registrar of the International Court of Justice, Peace Palace, 2517 KJ The Hague, Netherlands.* Tel. (+ 3170) 302 23 23. Fax (+ 3170) 364 99 28. E-mail : mail@icj-cij.org

On peut acquérir les publications de la **COUR INTERNATIONALE DE JUSTICE** auprès des librairies spécialisées du monde entier. Pour tous renseignements, prière de s'informer aux adresses suivantes :

Organisation des Nations Unies, Section de vente et commercialisation, Bureau C-115, Palais des Nations, 1211 Genève 10, Suisse. Tél. (+ 4122) 917 26 14. Télécopie (+ 4122) 917 00 27. Adresse électronique : unpubli@unog.ch

ou :

United Nations, Sales and Marketing Section, Room DC2-853, New York 10017, Etats-Unis d'Amérique. Tél. (+ 1-212) 963 83 02. Télécopie (+ 1-212) 963 34 89. Adresse électronique : publications@un.org

Pour toutes questions autres que l'achat de publications, s'adresser à *Monsieur le Greffier de la Cour internationale de Justice, Palais de la Paix, 2517 KJ La Haye, Pays-Bas.* Tél. (+ 3170) 302 23 23. Télécopie (+ 3170) 364 99 28. Adresse électronique : mail@icj-cij.org.

IMPRIMÉ EN FRANCE
PRINTED IN FRANCE

ISSN 0074-4433
ISBN 92-1-070843-1